

No. 1173

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM I. PHILLIPS,

Appellant,

vs.

MANUFACTURERS TRUST COMPANY,
a Corporation, and ALEXANDER LEWIS,

Appellees.

Transcript of the Record

*On Appeal from the District Court of the United States
for the District of Idaho, Southern Division.*

FILED
SEP 11 1938

PAUL F. OSBORN,
CLERK

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a Corporation, and ALEXANDER LEWIS,

Appellees.

Transcript of the Record

*On Appeal from the District Court of the United States
for the District of Idaho, Southern Division.*

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

SERENES T. SCHREIBER,
ALFRED A. FRASER,
Boise, Idaho,
Attorneys for Appellant.

JESS HAWLEY
OSCAR WORTHWINE
Boise, Idaho,
Attorneys for Appellees.

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IN THE DISTRICT OF THE THIRD JUDICIAL
DISTRICT IN THE STATE OF IDAHO
IN AND FOR ADA COUNTY.

WILLIAM I. PHILLIPS,

Plaintiff,

vs.

MANUFACTURERS TRUST COMPANY
(a corporation), and ALEXANDER LEWIS

Defendants.

COMPLAINT

Filed in the State Court February 8, 1937.

The plaintiff complains of the defendants and alleges:

I.

That at all of the times hereinafter mentioned the above named defendant, Manufacturers Trust Company was and is a banking corporation engaged in general business and banking in New York City, State of New York, and is doing business in the state of Idaho, and as such had the transactions as hereinafter set forth, though its officers reside in New York.

II.

That as plaintiff is informed and believes and therefore upon such information and belief alleges, that the above named defendant through its officers, directors, and agents, and prior to the times hereinafter particular-

ly set forth entered into a conspiracy to defraud this plaintiff and others through the fraudulently leasing and optioning of certain mineral and mining property in the State of Idaho to-wit:

The Alice, Lincoln, and Lookout quartz mining claims being survey No. 1765 and the North Lincoln Lode described as follows:

Beginning at corner No. 1 identical with No. 1 survey No. 2520 Kingston Lode whence corner of sections 15, 16, 21, and 22, T. 6 N., R. 1 E. B-M bears N. $16^{\circ} 36'$ W. 644 feet thence S. $9^{\circ} 12'$ W. 600 feet to corner No. 2 identical with corner No. 2 survey No. 2520 Kingston Lode: Corner No. 2 Lookout and Corner No. 1 Lincoln Lodes, both of survey No. 1765, thence N. $72^{\circ} 32'$ W. 1493.7 feet to corner No. 3 identical with corner No. 4 Lincoln and corner No. 1 Alice Lodes both of survey No. 1765, thence N. $9^{\circ} 12'$ E. 600 feet to corner No. 4 thence S. $72^{\circ} 32'$ E. 1493.7 to corner No. 1, the place of beginning containing 20.361 acres more or less.

The Annie Laura Lode described as follows: Beginning at corner No. 1 whence $\frac{1}{4}$ section corner between section 21 & 22 T. 6 N. R. 1 E. B-M bears S. $0^{\circ} 19'$ E. 800.3 feet, thence N. $82^{\circ} 30'$ W. 1156.4 feet to N. No. 2, thence N. $12^{\circ} 20'$ E. 232 feet to corner No. 3 situated on line 23 survey No. 1765 Lincoln Lode, thence S. $71^{\circ} 03'$ E. 1160 feet to corner No. 4 identical with corner No. 3 Lookout and

corner No. 2 Lincoln Lodes both of survey No. 1765 thence S. 12° 20' W. 1 foot to corner No. 1 place of beginning containing 3.082 acres more or less;

and which record title purports to be and is recorded in the office of Recorder of Gem County, Idaho, in the name of one Alexander Lewis, also a defendant herein.

III.

That acting pursuant to said conspiracy said defendant Alexander Lewis upon his own behalf and as agent of said Manufacturers Trust Company, its officers and directors and in the course of his duties and employment as such on or about the 19th day of Nov. 1931, year, falsely and fraudulently by himself, and through his agents, and joint co-conspirators and their agents made an option and an agreement of lease in writing of the above described mining property to plaintiff for a valuable consideration on the above described premises, representing that he was the true owner of that certain property and mining premises, and plaintiff relying thereon and believing the said representations as true in fact when they were false and untrue and known and made by defendants with the intention to deceive and ultimately defraud the plaintiff; nevertheless caused, procured and induced plaintiff to accept the same in good faith, and to enter upon said premises and make large expenditures for improvements, and machinery, and in developing said mining claims, and mining the same, and paying out sums of money as royalty thereunder to defendants and as plaintiff is further informed and

believes, with full knowledge and acquiescence of defendant, Manufacturers Trust Company, its officers and agents, and in the course of their employment of said company as agents of said bank, greatly to plaintiff's injury and damage, and did finally dispossess and deprive the plaintiff of all his rights and interest in said premises because of the fraudulent option and lease, and by the unlawful and illegal assignments in blank attempted and made thereof which were deceitfully and secretly held by the Manufacturers Trust Company, defendant herein, and which ultimately deprived this plaintiff of all his interest, and resulted in a total loss and damage to plaintiff in the sum of approximately Five Hundred Thousand (\$500,000.00) Dollars.

IV.

That on or about February 15, 1934, after said plaintiff discovered the falsity of said representations and the deceitful acts of the defendants, he ceased operating and developing said mining property and delivered the same to the defendants on their demand, and then and there demanded a return to him of the moneys so paid and expended, all of which defendant, Manufacturers Trust Company has, and has now the benefit of and is unjustly enriched thereby, and none of which sums or amounts have been repaid to the plaintiff but remain due and owing from defendants to plaintiff herein together with legal interest thereon.

WHEREFORE, plaintiff prays judgment against

said defendants in the sum of Five Hundred Thousand (\$500,000.00) Dollars with interest from February 15th, 1934, at the legal rate together with cost and disbursement in this action.

S. T. SCHREIBER,
Attorney for Plaintiff,
Residence Boise, Idaho.

(Duly verified)

(Title of Court and Cause)

SUMMONS

RECEIVED SHERIFF'S OFFICE

Feb. 8, 1937
Ada County, Idaho
4:45 P. M.

RECEIVED SHERIFF'S OFFICE

Feb. 12, 1937
Ada County, Idaho

RECEIVED SHERIFF'S OFFICE

Feb. 10, 1937
Gem County, Idaho
Filed in the State Court
February 27, 1937

THE STATE OF IDAHO

Sends Greetings to the above named defendants.

YOU ARE HEREBY NOTIFIED That a complaint has been filed against you in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, by the above named Plaintiff, and you are hereby directed to appear and plead to the said complaint within twenty days of the service of this summons.

.....
.....
.....
.....

and you are further notified that unless you so appear and plead to said complaint within the time herein specified, the plaintiff will take judgment against you as prayed in said complaint.

WITNESS my hand and the seal of said District Court, this 8th day of February, 1937.

(Court Seal)
S. T. SCHREIBER,

STEPHEN UTTER,
Clerk.

Attorney for Plaintiff
Residing at Boise, Idaho.

By B. CLYDE EAGLESON
Deputy Clerk.

RETURN ON SUMMONS

State of Idaho)
County of Ada) ss.

I hereby certify and return that I received the annexed summons on the 8th day of February, 1937, and I further certify that I personally served the same on the 8th day of February, 1937, on the Manufacturers Trust Company, a corporation, one of the defendants named in said summons, by delivering to and leaving with Stephen Uter, County Auditor, of Ada County, Idaho, personally at Boise, County of Ada, State of Idaho, a copy of said summons together with a copy of the complaint in said action attached to said copy of summons. The defendant, Manufacturers Trust Company, a corporation, is a foreign corporation, and does not have any designated person or agent actually residing in Ada County, Idaho, upon whom process can be served. The Secretary of the State of the State of Idaho, states, that the said defendant Manufacturers Trust Company, has not filed a designation of Agent in his office. Service on the said Manufacturers Trust Company, a foreign corporation, was made pursuant to the provisions of paragraph 3 of 5- 507 Idaho Code Annotated.

Dated at Boise, Ada County, Idaho, this 8th day of February, 1937.

Don Headrick, Sheriff

By Heath Sebern

Deputy

Subscribed and sworn to before me this 8th day of February, 1937.

Stephen Utter
Clerk of the District Court,
Ada County, Idaho.

By Chloe B. Burnett, Deputy Clerk.

RETURN ON SUMMONS

SHERIFF'S OFFICE)
COUNTY OF GEM,) ss.
STATE OF IDAHO)

I, Boise G. Riggs, Jr., Sheriff of Gem County, Idaho, do hereby certify and declare that I received the within summons for service on the 10th day of February, 1937, and that I served said summons on said Manufacturers Trust Company, a corporation, one of said defendants, by delivering to Lillian M. Campbell, personally in Gem County, Idaho, on the 10th day of February, 1937, a true copy of said summons together with a true copy of the complaint mentioned in said summons, said Lillian M. Campbell, then and there being the Clerk, Auditor and Recorder of Gem County, Idaho.

I further certify that I left a copy of said summons together with a true copy of the complaint attached to said copy of summons with Lillian M. Campbell, personally in Gem County, Idaho, on the 10th day of February,

1937, for service on the President of the Manufacturers Trust Company, a corporation, as per Chapter 5, Section 507, Idaho Code Annotated.

I further certify that after due search and diligent inquiry that I am unable to find the defendant, Alexander Lewis, in Gem County, Idaho.

Dated February 10th, 1937.

FEES:		Boise G. Riggs, Jr.,
Service of summons...\$2.00		Sheriff of Gem County,
Mileage\$.20		Idaho.
Return\$.40		Subscribed and sworn to
	—	before me this 10th day
Total\$2.60		of February, 1937.

(Seal)
Sheriff's
Paid Feb. 11, 1937
Gem County.

J. P. Reed,
Notary Public for State
of Idaho, Residence Em-
mett, Idaho.
Sheriff's Office
Paid Feb. 11, 1937
Gem County, Idaho.

(COPY)

Filed in the State Court

February 27, 1937

February 10, 1937

Manufacturers Trust Company

555 Broad Street

New York City, New York

Attention: Mr. Harvey D. Gibson, President

Dear Sirs:

Enclosed herewith summons and copy of complaint in the case of William I. Phillips vs. Manufacturers Trust Company, which was served on me as Auditor of Gem County and forwarded to you as required by our statutes.

Very truly yours,

LMC:LL Enc. 1

Auditor

(Registered)

STATE OF IDAHO)

COUNTY OF GEM.) ss.

I, Lillian M. Campbell, Ex-Officio Auditor of Gem County, Idaho, do hereby certify that the above is a full, true and correct copy of the copy of letter addressed to Manufacturers Trust Company, 55 Broad Street, New York City, New York, under date of February 10th, 1937.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 26th day of February, 1937.

(SEAL)

Lillian M. Campbell
Ex-Officio Auditor
Gem County, Idaho

(COPY)

MANUFACTURERS TRUST COMPANY
Fifty-Five Broad Street
New York, N. Y.

February 15, 1937

Miss Lillian M. Campbell, Auditor
Gem County
Emmett, Idaho

Dear Madam:

This is to acknowledge receipt of your favor of the 10th instant enclosing summons and complaint in the matter of William I. Phillips against Manufacturers Trust Company and Alexander Lewis, as stated, for which please accept our thanks.

Very truly yours,
William L. Schneider
William L. Schneider
Vice President

STATE OF IDAHO,)
COUNTY OF GEM.) ss.

I, Lillian M. Campbell, Ex-Officio Auditor of Gem County, Idaho, do hereby certify that the above is a full, true and correct copy of letter received from William L. Schneider, Vice President of the Manufacturers Trust Company, under date of February 15th, 1937.

IN WITNESS WHEREOF, I have hereunto set my

hand and affixed my official seal this 26th day of February, 1937.

(SEAL)

Lillian M. Campbell
Ex-Officio Auditor
Gem County, Idaho

(Title of Court and Cause)

NOTICE

Filed in the State Court

February 27, 1937

TO THE ABOVE NAMED PLAINTIFF AND TO
S. T. SCHREIBER, ESQ., HIS ATTORNEY:

PLEASE TAKE NOTICE, That the defendant, Manufacturers Trust Company, herein will on the 27th day of February, 1937, file in the above entitled court its petition and bond for the transfer and removal of the above entitled action from the court wherein said cause is now pending into the District Court of the United States, for the District of Idaho, Southern Division, a copy of which petition and bond are herewith served upon you, and in accordance with and pursuant to said petition and bond, will, on Thursday, March 4, 1937, at 10:00 o'clock A. M., or as soon thereafter as counsel may be heard, present the same to the Honorable Charles F. Koelsch, Judge of the above entitled court, in his chambers of said court at Boise, Ada County, Idaho, and

prays for an order approving said bond and removing said cause to said District Court of the United States for the District of Idaho, Southern Division.

DATED this 27th day of February, 1937.

Hawley & Worthwine
HAWLEY & WORTHWINE,
Residence: Boise, Idaho.
Attorneys for Defendants.

Service by receipt of copy of the foregoing notice and papers therein referred to, is hereby admitted this 27th day of Feb., 1937.

S. T. Schreiber
S. T. SCHREIBER
Attorney for Plaintiff,
Residence: Boise, Idaho.

(Title of Court and Cause)

PETITION FOR REMOVAL
Filed in the State Court
February 27, 1937

TO THE HONORABLE DISTRICT COURT OF
THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA:

COMES NOW, Your Petitioner, Manufacturers

Trust Company, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, a resident and citizen of the State of New York, with its principal place of business being in New York City, said State of New York, and respectfully shows and represents to this Honorable Court.

I.

That this is a suit of civil nature and that the amount in dispute between the plaintiff and the defendants exceeds, exclusive of interest and costs, the sum of \$3,000.00. That this is an action commenced and maintained by the plaintiff to secure a judgment against the defendants for the sum of FIVE HUNDRED THOUSAND DOLLARS, (\$500,000.00), together with costs of suit as will more fully appear from the plaintiff's complaint on file herein.

II.

That the said action was commenced in the above entitled court on the 8th day of February, 1937, and that Summons was issued out of said court in said cause and was on that day served on Stephen Utter, Auditor and Recorder of Ada County, State of Idaho; upon the theory and under the claim that service on said Auditor and Recorder is service upon the said defendant corporation, Manufacturers Trust Company; that the time of appearance on the party of the defendants has not expired; and that the defendant, Manufacturers Trust Company, has appeared specially in said action by motion to quash service of said summons and complaint.

III.

That your petitioner avers that at the time of the commencement of this action, and ever since, the plaintiff, has been and now is a citizen and resident of the State of Idaho; that the defendant, Manufacturers Trust Company, a corporation, at the time of the commencement of this action, and ever since, has been and now is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is not now, and never has been a resident and citizen of the State of Idaho, but is a resident and citizen of the State of New York; that the defendant, Alexander Lewis, is a citizen and resident of the State of New York, and is not now, and never has been a resident of the State of Idaho, but is a resident and citizen of the State of New York; that service of said summons and complaint have not been made upon the said Alexander Lewis and he has not appeared in person or by an attorney in the above entitled court and cause.

IV.

That the District Court of the United States for the District of Idaho, Southern Division thereof, has *jurisdiction* original jurisdiction of this action, and that your petition desires that said action be removed from the court wherein it is now pending into the said District Court of the United States, for the District of Idaho, Southern Division.

V.

That this controversy and every issue of law and fact therein is between citizens and residents of different states

—the plaintiff being a citizen and resident of the State of Idaho, and the defendants being citizens and residents of the State of New York, and that more than \$3,000.00, exclusive of interest and costs, is involved herein.

VI.

Your petitioner offers herewith a bond with good and sufficient surety for its entry in said District Court of the United States, in and for the District of Idaho, Southern Division, sitting at Boise, Idaho, within thirty days from the date of filing of this petition, a certified copy of the record in this case and for paying all costs that may be awarded by said District Court of the United States, if it shall hold that such suit was wrongfully and/or improperly removed thereto, and as provided by the statutes of the United States in such cases made and provided.

Your petitioner therefore prays this court to proceed no further herein except to make the order of removal as required by law and the statutes of the United States, and to accept and approve said bond and surety, and to cause the record herein, as aforesaid, to be removed into the District Court of the United States, in and for the District of Idaho, Southern Division.

And your petitioner will ever pray.

Hawley & Worthwine
HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Petitioner.

(Duly verified)

(Title of Court and Cause)

BOND ON REMOVAL

Filed in the State Court

February 27, 1937

KNOW ALL MEN BY THESE PRESENTS, That Manufacturers Trust Company, a corporation, as principal, and National Surety Corporation, a corporation, as surety (said surety being duly and fully authorized under the acts of Congress and laws of the State of Idaho) are held and firmly bound unto the above named plaintiff, William I. Phillips, in the sum of FIVE HUNDRED DOLLARS (\$500.00), for the payment of which well and truly to be made unto the said plaintiff and his assigns, it binds itself, its heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents; upon condition nevertheless that

WHEREAS, the above named plaintiff has heretofore brought a suit of civil nature in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, against Manufacturers Trust Company, a corporation, and Alexander Lewis, defendants; and

WHEREAS, the said defendant, Manufacturers Trust Company, simultaneously with the filing of this

bond, intends to file its petition in said suit in such state court for the removal of such suit into the District Court of the United States for the District of Idaho, Southern Division, the District in which the said suit is pending according to the provisions of the Acts of Congress in such case made and provided.

NOW, THEREFORE, the condition of this obligation is that if the said petition shall enter in the District Court of the United States for the District of Idaho, Southern Division, within thirty days from the date of the filing of said petition, a certified copy of the record in such suit and shall pay all costs that may be awarded by the said District Court if said court shall hold that said suit was wrongfully and/or improperly removed thereto, and shall also appear and enter special bail in such suit if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in fully force and virtue.

Dated this 27th day of February, 1937.

MANUFACTURERS TRUST COMPANY,
a corporation,

By Jess Hawley,
One of its Attorneys, and
authorized to sign this bond.

NATIONAL SURETY CORPORATION,
a corporation,

By Frank G. Ensign
Frank G. Ensign,

Its Attorney In Fact.

Countersigned: (SEAL)

Frank G. Ensign

Frank G. Ensign,

Resident Agent,

Residing at Boise, Idaho.

(Title of Court and Cause)

MOTION TO QUASH SERVICE OF SUMMONS
AND COMPLAINT.

Filed in the State Court

February 27, 1937

COMES NOW, the defendant, MANUFACTURERS TRUST COMPANY, a corporation, by its Attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of quashing the purported service and the jurisdiction of the court under said attempted service, and not generally, or for any other purpose whatsoever, and does respectfully show the court:

I.

That Manufacturers Trust Company is a corporation created, organized, and existing under and by virtue of the laws of the State of New York, and is a resident and citizen of the State of New York; that the said corporation is not now, or at any other time has it been doing business in the State of Idaho.

II.

That service of summons and complaint in this case has never been made upon the said defendant, Manufacturers Trust Company, by personal service or otherwise, but that on or about the 8th day of February, 1937, the plaintiff caused a copy of the said summons and complaint in this case to be served upon Stephen Utter, Auditor and Recorder of Ada County, State of Idaho, at his office in the court house in Boise, Idaho. That the said Auditor and Recorder above named was not on the 8th day of February, 1937, or at any other time, and is not now the agent or business agent transacting business for said Manufacturers Trust Company, a corporation, in the State of Idaho, or elsewhere.

That said defendant, Manufacturers Trust Company, was not on the said 8th day of February, 1937, or at any other time, and is not now doing business in the State of Idaho, and that the purported service of summons and complaint in this case upon the said Stephen Utter, as Auditor and Recorder of Ada County, State of Idaho, did not constitute service thereof upon the said defendant corporation; that it is not and has not been served with summons and complaint in this action as provided by law.

III.

That this Honorable Court, therefore, does not have jurisdiction of the defendant corporation, the Manufacturers Trust Company.

WHEREFORE, Hawley & Worthwine respectfully move that the purported summons and complaint on the defendant, Manufacturers Trust Company, a corporation, be quashed.

This motion is based upon the records and files in this action, including this motion.

Dated this 27th day of February, 1937.

Hawley & Worthwine

HAWLEY & WORTHWINE,

Residence: Boise, Idaho,

Attorneys for Defendant Manufacturers Trust Company, a corporation, appearing specially.

(Duly verified)

Service by receipt of copy of the foregoing motion is hereby admitted this 27th day of Feb., 1927.

S. T. Schreiber,

S. T. SCHREIBER,

Attorney for Plaintiff,

Residence: Boise, Idaho.

(Title of Court and Cause)

OBJECTION TO ALLOWANCE OF PETITION
FOR REMOVAL

Filed in the State Court

March 3, 1937

TO THE HONORABLE DISTRICT COURT OF
THE THIRD JUDICIAL DISTRICT, JUDGE
CHARLES F. KOELSCH, PRESIDING:

Comes now the plaintiff W. I. Phillips in the above entitled cause and objects to the removal of the said action to the District Court of the United States for the District of Idaho, Southern Division thereof, and for reasons therefore states:

I.

That said petition is not sufficient and does not state facts sufficient to warrant the Judge of this Court to grant the petition for removal.

II.

That the said bond as tendered by the defendants herein is not a valid and sufficient bond in law to protect the said Willim I. Phillips against cost and damages which may be awarded in the premises.

Dated March 3, 1937.

S. T. SCHREIBER,
Attorney for Plaintiff
William I. Phillips.

(Title of Court and Cause)

AFFIDAVIT IN OPPOSITION OF MOTION
TO QUASH

Filed in the State Court

March 4, 1937

STATE OF IDAHO)
COUNTY OF ADA) ss.

Ralph Shaffar being first duly sworn deposes and says that he is a resident of Idaho and living at Meridian in Ada County. That he in the month of September, 1934, with others went to the Linclon Mine in Gem County, Idaho, for the purpose of seeking employment and on that occasion saw three men working on said property and that he conversed with one Herb Marcum relative to employment. That at said time the men were sinking a vertical shaft east of the big shaft and hoisthouse on said property.

That subsequently again this affiant was on said property in July, 1936, and on that occasion saw two men working on and sinking same said shaft upon said property and they were taking out rock with a windlass, and further affiant saith not.

Ralph Shaffer.

SUBSCRIBED AND SWORN TO before me this
3rd day of March, 1937.

(SEAL)

G. J. GARDNER,
Notary Public for Idaho,
Residing at Boise, Idaho.

My Commission expires: Nov. 22, 1937.

(Title of Court and Cause)

AFFIDAVIT

Filed in the State Court
March 4, 1937

STATE OF IDAHO)
COUNTY OF ADA) ss.

William I. Phillips first being duly sworn deposes and says that I am W. I. Phillips who is the plaintiff in the above entitled cause against the Manufacturers Trust Company, a corporation, and Alexander Lewis, defendants in said action.

That I am fully acquainted with all the facts pertaining to the matter set out in the plaintiff's complaint in said action and that said action was brought on the 8th day of February, 1937, against the defendants therein and that said defendants, both the corporation and Alexander Lewis, reside in the State of New York.

That the said Manufacturers Trust Company is a corporation organized under the laws of the State of New

York and is conducting a business in the State of Idaho under an assumed named, to wit: Alexander Lewis who is a resident of New York and not a resident of Idaho and has no interest in said property.

That said Manufacturers Trust Company has been for a period of several years and is still at this time engaged in doing business within the state as this affiant is informed and upon such information and belief alleges that the said Manufacturers Trust Company is conducting said Lincoln mining property and operating the same at the present time, and is buying electric power and supplies and paying taxes, and paying wages to men employed, and is carrying insurance policies, all of which is being conducted in the name of Alexander Lewis who is by his own testimony not the owner of said property but that said business is being done through divers methods and divers people who are the agents of the said Manufacturers Trust Company as well, appears in the said petition of the applicant for removal.

And further affiant saith not.

William I. Phillips.

SUBSCRIBED AND SWORN to before me a Notary Public for the State of Idaho this 3rd days of March, 1937.

(SEAL)

G. J. Gardner
Notary Public for Idaho,
Residence: Boise, Idaho.

(Title of Court and Cause)

AUTHORITY OF ATTORNEY TO SIGN BOND

Filed in State Court

March 4, 1937

Having authorized our Attorney, JESS HAWLEY, to sign a bond in the principal sum of FIVE HUNDRED DOLLARS (\$500.00), and as required by the Statutes of the United States in connection with the removal of the above entitled cause to the District Court of the United States for the District of Idaho, Southern Division, prior to the filing of said bond, the defendant, Manufacturers Trust Company, a corporation, does hereby ratify and approve the action of said Jess Hawley in the signing and filing of said bond in the above entitled court and cause.

MANUFACTURERS TRUST COMPANY
(Corporate Seal)

By James L. Fozard,
Vice-President.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

On this 2nd day of March, 1937, before me personally came JAMES L. FOZARD, to me known, who being by me duly sworn, did depose and say, that he resides at 52 Harrison Avenue, Roseland, New Jersey; that he is a Vice-President of MANUFACTURERS TRUST

COMPANY, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Nathan Borak,
NATHAN BORAK
Notary Public.

Bronx Co. Clk's No. 186 Reg. No. 171B37
New York Co. Clk's No. 1015 Reg. No. 7B588
Kings Co. Clerk's No. 120 Register No. 7477
Queens Co. Clk's No. 1815 Reg. No. 7026

(.....) Certificate filed in Westchester Co.
Commission expires March 30, 1937.



Form 2

No. 73227 Series D

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

I, ALBERT MARINELLI, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county, DO HEREBY CERTIFY, That said Court is a Court of Record, having by law a seal; that

NATHAN BORAK

whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument

was at the time of taking the same a NOTARY PUBLIC acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Bronx with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 2 day of Mar., 1937.

(Court Seal)

Albert Marinelli,
Clerk.

(Title of Court and Cause)

ORDER OF REMOVAL

Filed in State Court

March 4, 1937.

Filed in U. S. District Court

March 19, 1937.

The petition for removal in the above-entitled cause coming on regularly for hearing,

IT IS HEREBY ORDERED that the said cause shall be removed to the District Court of the United States for the District of Idaho, Southern Division, and the Clerk of the above entitled cause is hereby ordered to make necessary certification of the record.

DATED this 4th day of March, 1937.

CHAS. F. KOELSCH, District Judge.

(Title of Court and Cause)

March 4, 1937

CORRECTED MINUTES OF STATE COURT

No. 15448

In this cause the defendants having filed notice, motion to quash service on summons and complaint, and petition and bond for removal to the District Court of the United States for the District of Idaho, Southern Division, and the plaintiff having filed objections thereto supported by

affidavits, and the same being argued before the Court by counsel for the respective parties. Thereupon counsel for defendants agreed to file "authority of attorney" to sign Bond. Whereupon he did file the same in open Court.

Whereupon the Court ordered that the cause be removed to the District Court of the United States for the District of Idaho, Southern Division, and in open Court signed said order.

CHAS. F. KOELSCH,
District Judge.

CERTIFICATE

STATE OF IDAHO)
COUNTY OF ADA) ss.

I, STEPHEN UTTER, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original Complaint, Summons, Return on Summons, Service of Summons and Letter to Clerk of Gem County, Notice, Petition for Removal, Bond of Removal, Motion to Quash Service of Summons and Complaint, Objection to Allowance of Petition for Removal, Affidavit in Opposition of Motion to Quash, Affidavit, Authority of Attorney to Sign Bond and Order of Removal filed in the above entitled action and remaining now on file in my office at Boise City, Ada County, Idaho.

Given under my hand and the seal of said Court, at office in Boise City, Ada County, Idaho, this 18th day of March, 1937.

(SEAL) Stephen Utter,
Clerk.
By Otto F. Peterson,
Deputy.

IN THE DISTRICT COURT OF THE UNITED
STATES OF AMERICA IN AND FOR THE
DISTRICT OF IDAHO, SOUTHERN
DIVISION.

WILLIAM I. PHILLIPS,
Plaintiff,

vs.

MANUFACTURERS TRUST COMPANY,
(a corporation), and ALEXANDER LEWIS,
Defendants.

MOTION TO REMAND

Filed March 30, 1937

TO THE HONORABLE C. C. CAVANAUGH, JUDGE
OF THE ABOVE ENTITLED COURT:

Now comes the plaintiff and moves the Court to re-mand the above entitled cause to the STATE COURT from whence it was removed, for trial for the following reasons:

First: That the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the said District Court of the United States.

Second: Because at the time attorneys for the defendants to-wit: February 27, 1937, filed appearance in said cause in the State Court and motion challenging the jurisdiction of said District Court thereby seeking to quash the service of summons and complaint, they waived the right of removal.

Third: Because all of the defendants in said action did not join in the petition for removal which was filed on February 27, 1937, and that but a single controversy, and not a separable one exists.

Fourth: And which petition was not accompanied by a good and sufficient and valid bond warranting the Court to transfer and remove the cause.

Fifth: That there was no acceptance or approval of said Bond.

Sixth: Because further that said action is in tort against a foreign corporation doing business in the State of Idaho which did not, and has not complied with the laws of the state relative to such corporations, and therefore, is properly suable in the Courts of this state in actions arising in tort within the state, and the diversity of citizenship in such instance is not pertinent, all of which facts are apparent from the record in this cause.

Seventh: That the said cause was prematurely re-

moved, particularly in this, to-wit, that said cause was ordered removed by, and was removed from said State Court to said Federal Court before service of summons upon said defendants therein, except upon the defendant Manufacturers Trust Company, and before the return of said summons of service to State Court, and without said Court having any evidence before it of said service on the other defendant.

WHEREFORE: Plaintiff avers that this Court has not jurisdiction to try and determine this cause, and prays that the same may be remanded to the Third Judicial District Court of the State of Idaho in and for Ada County from whence it came.

S. T. Schreiber,
Attorney for Plaintiff,
Residence, Boise, Idaho.

(Duly verified)

Received a copy and accept service of the above and foregoing motion this 30th day of March, 1937.

HAWLEY & WORTHWINE,
Attorneys for Defendants,
Residence, Boise, Idaho.

(Title of Court and Cause)

AFFIDAVITS ON MOTION TO REMAND

Filed March 30, 1937

STATE OF IDAHO)
 COUNTY OF ADA) ss.

I, JAMES BAXTER, being first duly sworn on oath depose and say that I am President and General Manager of the Baxter Foundry and Machine Works, a corporation, of Boise, Idaho, located on South end of Capitol Boulevard in the City of Boise;

That in the month of May, 1933 one, B. Berthleson, an employee of the Lincoln Mines, came to the Foundry and conversed with the superintendent Firmin J. Arnould relative to the purchase of a quantity of mining equipment to be taken and used at the Lincoln Mines in Gem County, State of Idaho;

That Mr. Arnould and Mr. Berthleson after some considerable time selected a quantity of equipment to the value of \$729.40 consisting of:

- All Cast Iron Balls, for Grinding Ore.
- Two Babbitted Motor Bearings.
- Plunger Pump Rod and accessories.
- Stock of Norway Iron.
- Pump Casing.
- Lot of Pipe.
- Steel Split Pulleys.
- Lot of Spring Steel.
- Lot of Bolts and Nuts.
- Three furnaces complete with smoke pipes.

Brass Pump Valve Castings.

Lot of Pipe Couplings, Packing and Conveyor
Chain.

Air Receivers with Accessories.

Special Water Pulley.

Motor Base.

“Jim Crow” Rail Bender.

Lot of Belting, & Belt Bender.

Lot of Miscellaneous Supplies.

Filter Valve.

Steel Split Pulleys.

Special Split Cast Iron Pulley.

Lot of Mild and Curciform Drill Steel.

Lot of Hollow Drill Steel.

That the said Berthleson requested that the said equipment should be delivered immediately to the Lincoln Mines, that they were working, and the same was delivered to the Lincoln Mines and he further stated that this equipment is being purchased in the name of one Alexander Lewis, an employee of the Manufacturers Trust, a big Corporation in New York, and would be paid for, and further affiant saith not.

James Baxter.

Subscribed and sworn to before me this 25th day of
March, 1937.

Truman Joiner,
Notary Public for Idaho,
Residing at Boise, Idaho.

(SEAL)

My Commission expires Feb. 27, 1939.

(Title of Court and Cause)

AFFIDAVIT

On Motion to Remand

Filed March 30, 1937

STATE OF IDAHO)
 COUNTY OF ADA) ss.

I, FIRMIN J. ARNOULD, being first duly sworn on oath depose and say:

That I am Firmin J. Arnould the affiant herein, a resident of Boise, Ada County, Idaho;

That I am and have been employed as superintendent at the Baxter Foundry and Machine Works in Boise, Idaho and was so employed during the month of May, 1933 at which time one B. Berthleson, an employee in the Lincoln Mines in Gem County, Idaho, came to the foundry and ordered a quantity of mining equipment something over \$700.00 worth for use at said property and at which time in discussing matters relative thereto, I asked him who was going to pay for this equipment and he stated that he acted for one Alexander Lewis who was an employee of the owner of the property, which was a large corporation in New York City—a banking corporation he called it—“The Manufacturers Trust and it had plenty of money to pay the bill and run the mines”, and further affiant saith not.

Firmin J. Arnould.

Subscribed and sworn to before me this 25th day of March, 1937.

(SEAL) Truman Joiner,
Notary Public for Idaho,
Residing at Boise, Idaho.

My Commission expires Feb. 27th, 1939.

(Title of Court and Cause)

AFFIDAVIT

Filed March 30, 1937

STATE OF IDAHO)
COUNTY OF ADA) ss.

J. W. Crowe, being duly sworn on oath, deposes and says that he is the Division Manager of the Idaho Power Company, a Corporation, at Boise, Idaho; that he has full charge of the Division (J. H. C.) books and accounts of said Corporation in and at his office in the Division which consists of Boise, Emmett, Nampa, Caldwell, Meridian, Mountain Home, and Glens Ferry and surrounding territory; that the Idaho Power Company carries and has carried the account of the Lincoln Mines for service rendered by said Company at Pearl, Idaho, in the name of one Alexander Lewis; that the service rendered is for electricity furnished by said Company at Pearl, Idaho, to the Lincoln Mine, and that said service has been continu-

ously rendered as aforesaid from July 21, 1933, until now, and at this time is being furnished. Further affiant sayeth not.

J. W. Crowe.

Subscribed and sworn to before me this 24th day of March, 1937.

M. E. Hughes,
Notary Public for Idaho,
Residing at Boise, Idaho.

(SEAL)

(Title of Court and Cause)

AFFIDAVIT OF SERVICE

Filed April 9, 1937

STATE OF IDAHO)
COUNTY OF GEM) ss.

I, Lilliam M. Campbell, Clerk of the District Court, Gem County, Idaho, do hereby certify that I received a post office registry return receipt signed Alexander Lewis in response to a registered letter under date of February 26, 1937, addressed by me to Mr. Alexander Lewis, c/o Manufacturers Trust Company, 55 Broad Street, New York City, New York, in which I enclosed a copy of summons and complaint in the case of William I. Phillips vs. Manufacturers Trust Company and Alexander Lewis served on me as Auditor of Gem County to be mailed to said Alexander Lewis.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of April, 1937.

(SEAL) Lillian M. Campbell,
Clerk of the District Court
Gem County, Idaho.

(COPY)

February 26, 1937

Mr. Alexander Lewis
c/o Manufacturers Trust Company
555 Broad Street
New York City, New York

Dear Sir :

Enclosed herewith summons and copy of complaint in the case of William I. Phillips vs. Manufacturers Trust Company, which was served on me as Auditor of Gem County and forwarded to you as required by statute. Your address having been given me today.

Very truly yours,

LMC:LL

Enc. 1

(Registered)

Auditor.

Reg. # 1074

Emmett, Idaho

sent Feb. 27 - 37

Co. Clerk to Alexander Lewis

N. Y., N. Y.

Return Receipt

Requested.

J. W. Tyler

Fee Paid.

Postmaster.

S.

(Title of Court and Cause)

AFFIDAVIT OF MOTION TO REMAND
Filed April 9, 1937

Truman Joiner, of Boise, County of Ada, and State of Idaho, being a duly qualified Certified Public Accountant within the State of Idaho, upon being duly sworn, deposes and makes the following statement having to do with a certain compensation insurance policy carried by one Alexander Lewis with the State Insurance Fund, an agency of the State of Idaho.

Affiant states that on the morning of April 6, 1937, affiant called upon Mr. P. C. O'Malley, manager of the State Insurance Fund, and requested general information as to compensation insurance, if any, carried upon workmen engaged at the Lincoln Mine in Gem County, Idaho, and requested that affiant be allowed to inspect such files and records as might be pertinent thereto. Request to inspect files and records was denied, but Mr. O'Malley did procure the files covering the matters mentioned, and, while referring to such files from time to time, did make substantially the following statements to affiant, namely:

That one, Alexander Lewis, of 55 Broad Street, New York City, New York, carried State Insurance Fund policy No. 15,488 and that said Alexander Lewis has carried such policy continuously since

1931, except that insurance thereunder was suspended from March 12, 1932, to May 8, 1933, but that otherwise such policy was and has been continuously in effect from some time in 1931 until the present time and that the policy was in full force and effect on April 6, 1937. That said Workmen's Compensation policy No. 15,488 issued to Alexander Lewis covered workmen employed at the Lincoln Mine between Boise and Emmett and that the payroll as reported was in excess of \$200.00 per month for most of the time said policy was in force.

Affiant further states that the statements as made by Mr. O'Malley were carefully recorded by affiant when and as they were made, and that Mr. O'Malley declined to give any information further than that stated above; and further affiant saith not.

Truman Joiner (SEAL)

STATE OF IDAHO)
COUNTY OF ADA) ss.

I, Elmer W. Fox, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that Truman Joiner, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day, in person, and acknowledge that he signed, sealed, and delivered the said instrument as his free and voluntary act and deed, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal, this 6th day of April, A. D., 1937.

(SEAL)

Elmer W. Fox,
Notary Public.

(Title of Court and Cause)

MINUTES OF THE COURT OF APR. 14, 1937

This case came on for hearing on the Plaintiff's motion to remand the cause to the state court. S. T. Schreiber, Esquire, appeared as counsel for the plaintiff, the defendant's counsel not appearing.

The Court heard argument of the plaintiff's counsel on the motion, after which the court took the matter under advisement.

(Title of Court and Cause)

MINUTES OF THE COURT OF APR. 15, 1937

Upon application of the Manufacturers Trust Company one of the defendants and the National Surety Corporation for permission to file joint power of attorney of the National Surety Corporation in which F. G. Ensign, and George W. Walker, jointly or severally, of Boise, Idaho, are constituted and appointed true and lawful attorneys in fact of the said National Surety Corporation.

It is ordered that said permission is granted.

GENERAL POWER OF ATTORNEY

Filed April 14, 1937.

KNOW ALL MEN BY THESE PRESENTS, that NATIONAL SURETY CORPORATION, a Corporation duly organized and existing under the laws of the State of New York, and having its principal office in the City of New York, N. Y., hath made, constituted and appointed, and does by these presents make, constitute and appoint F. G. Ensign and Geo. C. Walker, jointly or severally, of Boise and State of Idaho its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred in its name, place and stead, to execute, acknowledge and deliver any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings; provided, however, that the penal sum of any one such instrument executed hereunder shall not exceed TWO HUNDRED THOUSAND (\$200,000.00) DOLLARS and to bind the Corporation thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the Corporation and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney(s)-in-Fact may do in the premises. Said appointment is made under and by authority of the following provisions of the By-Laws of the NATIONAL SURETY CORPORATION:

“ARTICLE XII. RESIDENT OFFICERS AND ATTORNEYS-IN-FACT.

“Section 1. The President, Executive Vice President or any Vice President may, from time to time, appoint Resident Vice Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the Corporation and the President, Executive Vice President or any Vice President, the Board of Directors or the Executive and Finance Committee may at any time suspend or revoke the powers and authority given to any such Resident Vice President, Resident Assistant Secretary or Attorney-in-Fact, and also remove any of them from office.

“Section 4. ATTORNEYS-IN-FACT. Attorneys-in-Fact may be given full power and authority, for and in the name and on behalf of the Corporation, to execute, acknowledge and deliver, any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings, and any and all notices and documents cancelling or terminating the corporation’s liability thereunder, and any such instrument so executed by any such Attorney-in-Fact shall be as binding upon the Corporation as if signed by the President and sealed and attested by the Secretary.

“Section 7. ATTORNEYS-IN-FACT. Attorneys-in-Fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances, contracts of indemnity, or other conditional or obligatory undertakings, and they are also authorized and empowered to certify to copies of the By-Laws of the corporation or any Article or Section thereof.

IN WITNESS WHEREOF, the NATIONAL SURETY CORPORATION has caused these presents to be signed by its Vice-President and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 27th day of May, A. D., 1936.

NATIONAL SURETY CORPORATION

(SEAL)

By E. M. Allen,

ATTEST: Rankin Martin,

Vice President.

Assistant Secretary.

STATE OF NEW YORK,)

COUNTY OF NEW YORK,) ss.

On this 27th day of May, A. D., 1936, before me personally came E. M. Allen, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Vice-President of the NATIONAL SURETY CORPORATION, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order. And said E. M. Allen further said that he is acquainted with Rankin Martin and knows him to be the Assistant Secretary of said corporation; that the signature of the said Rankin Martin subscribed to said instrument attesting the seal hereunto affixed is in the genuine handwriting of the said Rankin Martin.

M. M. Miller,

Notary Public.

STATE OF NEW YORK,)
 COUNTY OF NEW YORK) ss.

I. H. Hussenetter, Resident Assistant Secretary of the National SURETY CORPORATION, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said NATIONAL SURETY CORPORATION, which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Corporation, at the City of New York, N. Y., this 10th day of April, A. D., 1937.

H. Hussenetter,
 Resident Assistant Secretary.

(SEAL)

 (Title of Court and Cause)

ORDER
 Filed April 16, 1938

The petition for removal and motion to remand having been presented and after consideration of the same it is ORDERED that the motion of the plaintiff to remand is denied.

Exception allowed.

Dated April 16th, 1937.

Charles C. Cavanah,
 District Judge.

(Title of Court and Cause)

EXCEPTIONS TO RULING OF THE COURT

Filed April 22, 1937

Be it remembered that on this day, to-wit: April 14, 1937, came on to be heard the plaintiff's motion to remand, number 1971, to the State Court from whence it was removed, and the court having heard the motion and argument of counsel, thereon, and having considered the same, said motion was by said Court in all things overruled and held for naught, to which ruling of the court plaintiff excepted, and here tenders his Bill of Exceptions asking that the same be approved and made a part of the record, which is accordingly done.

CHARLES C. CAVANAH,
District Judge of the above
entitled court.

Dated this 22nd day of April, 1937.

(Title of Court and Cause)

NOTICE, AND RENEWAL OF MOTION
TO REMAND.

Filed April 27, 1937

TO HAWLEY & WORTHWINE, ATTORNEYS
FOR DEFENDANTS:

PLEASE TAKE NOTICE, that the plaintiff William I. Phillips will on the fourth day of May, 1937, at the hour of 10 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard at the United States Court House in Boise, Idaho, apply for an order remanding the above entitled cause to the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, from which court it was removed.

There is herewith served upon you a copy of the motion which will be presented to the court at the time aforesaid, and a copy of the affidavit in support of said motion.

S. T. SCHREIBER,
Attorney for Plaintiff.
Residence, Boise, Idaho.

Received copy and accept service of the foregoing notice accompanied by affidavit and the motion therein referred to.

Hawley and Worthwine,
Attorneys for Defendants,
Residence, Boise, Idaho.

(Title of Court and Cause)

RENEWAL OF MOTION TO REMAND TO
STATE COURT.

Filed April 27, 1937

TO THE ABOVE ENTITLED COURT, THE HONORABLE JUDGE CHARLES C. CAVANAH, PRESIDING:

And now comes the plaintiff and moves the court to remand the above entitled cause to the state court from whence it was removed for trial for the following reasons:

FIRST: Because both defendants in the above entitled action were not joined and did not join in the removal petition.

SECOND: That since the removal of said cause to the District Court of the United States on March 19, 1937, more than 30 days have elapsed and no pleadings, answer, or demurrer, to the declaration or complaint of the plaintiff having being filed by the defendants as provided by statute, Judicial Code, Section 29, (Compiled Statute) Section 1011, and as amended); therefore removal has not been properly made nor completed and this court has no jurisdiction other than to remand said cause to the state court of the Third Judicial District in and for Ada County, from whence it was removed, and that said matter is mandatory.

WHEREFORE, plaintiff says this court has not jurisdiction to try and determine this case, and prays that the

same may be remanded to the Third Judicial District Court of the State of Idaho, from whence it came.

S. T. SCHREIBER,
Attorney for Plaintiff,
Residence, Boise, Idaho.

(Duly verified)

(Title of Court and Cause)

AFFIDAVIT ON MOTION TO SET ASIDE
ORDER AND REMAND CAUSE.

Filed April 27, 1937

UNITED STATES OF AMERICA,)
for the District of Idaho,) ss.
Southern Division,)
County of Ada.)

I am, and was at all the times herein mentioned, Attorney for plaintiff in the above entitled cause. That said cause was brought in the District Court of the Third Judicial District of the State of Idaho in Ada County at Boise, on February 8, 1937, after which the same was removed to the Federal Court and District aforesaid on motion of defendant, and filed and recorded on March 19, 1937, in said court by defendant, Manufacturers Trust Company, a corporation, before return

of service on Alexander Lewis, joint defendant, was had. The matter in dispute is not a separable controversy, but is a joint tort, and that the defendant Alexander Lewis did not join in said removal petition. That subsequently service was completed on said Lewis and on April 14, 1937, motion to remand said cause to the State Court was presented by counsel for plaintiff and the court taking the same under advisement did, on April 16 over rule said motion in all things, and held the same for naught and to which ruling the plaintiff excepted.

That no affidavit of merits of defense was ever filed by defendants and that no pleadings, answer, or demurrer has ever been filed since the removal to the aforesaid court and the time for pleading having now long since expired and no valid excuse or any excuse offered therefore. Affiant avers and verily believes that the defendants are wilfully delaying said cause and have not a good and sufficient and meritorius defense on the merits to the cause of action set up in plaintiff's complaint, but are seeking to delay and wilfully procrastinate the final determination thereof. That this court should by reason of the record and the law in such case provided in justice remand the said cause to the state court. And further affiant saith not.

S. T. Schreiber.

Subscribed and sworn to before, Clerk of District Court, Ada County in and for the State of Idaho, this 27th day of April, 1937.

(SEAL)

Stephen Utter, Clerk,
Residing at Boise, Idaho.
By B. Clyde Eagleson,
Deputy Clerk.

(Title of Court and Cause)

MINUTES OF THE COURT OF MAY 4, 1937.

The plaintiff's renewed motion to remand the cause to the State Court was presented by his counsel S. T. Schreiber, Esquire, and said motion was argued before the Court by counsel for the respective parties.

The Court denied the renewed motion to remand.

(Title of Court and Cause)

BILL OF EXCEPTIONS

Filed May 10, 1937

Be it remembered that on this fourth day of May, 1937, came on to be heard the plaintiff's Renewal Motion to remand the above entitled and numbered cause 1971, to the State Court from whence it was removed, and the court having heard the motion and argument of counsel for plaintiff thereon, and the argument of counsel for defendants opposed thereto as well, and having

considered the same, said motion was by the said court in all things overruled and held for naught, to which ruling of the court plaintiff excepted and here tenders his bill of exceptions, asking that same be approved and made a part of the record, which is accordingly done.

May 10th, 1937.

Charles C. Cavanah,
Judge of said entitled court.

(Title of Court and Cause)

PRAECIPE FOR DEFAULT

Filed June 2, 1937

To W. B. McREYNOLDS, Clerk for the District Court of the Ninth District of Idaho, Southern Division:

You will please enter the default of the defendants herein for want of answer or defense in the above entitled cause.

S. T. Schreiber,
Attorney for Plaintiff,
Residing at Boise, Idaho.

DATED this 2nd day of June, 1937.

(Title of Court and Cause)

DEFAULT

Filed June 2, 1937

IN THIS ACTION, The defendant MANUFACTURERS TRUST COMPANY, a corporation, and the defendant ALEXANDER LEWIS having been regularly served with process, and having failed to appear and answer the plaintiff's complaint filed herein, and the time allowed by law for answering having expired, the default of the said defendant MANUFACTURERS TRUST COMPANY (a corporation) and the defendant, ALEXANDER LEWIS in the premises is hereby duly entered according to law.

Witness my hand and the seal of said Court this 2nd day of June, 1937.

W. D. McReynolds

Clerk

(SEAL)

By Lona Manser,

Deputy Clerk

(Title of Court and Cause)

MOTION TO MAKE DEFAULT JUDGMENT
FINAL

Filed July 6, 1937

COMES NOW The plaintiff, William I. Phillips, in the above entitled Court and cause, and moves the Court that the default entered on June 2, 1937 be made final,

and that the cause be set down for hearing, examination, and determination of the amount justly to be fixed as the damages due to and sustained by plaintiff and to render judgment therefore final against defendants.

Dated this 6th day of July, 1937.

S. T. Schreiber
Attorney for Plaintiff
Residing at Boise, Idaho

(Title of Court and Cause)

MOTION TO SET ASIDE DEFAULT

Filed August 6, 1937

COMES NOW, the defendant, Manufacturers Trust Company, a corporation, by its attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of setting aside the default of the said defendant entered in the above entitled court, and not generally or for any other purpose whatsoever, and does respectfully show the court :

I.

That the Manufacturere Trust Company is a corporation created, organized and existing under and by virtue of the laws of the State of New York, and is a resident and citizen of the State of New York, and that the said corporation is not now or at any other time has not been doing business in the State of Idaho.

II.

That upon the 27th day of February, 1937, this specially appearing defendant filed in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, its petition and bond for a removal of the above entitled cause from said District Court of the Third Judicial District of the State of Idaho, in and for Ada County, to the District Court of the United States, for the District of Idaho, Southern Division, and at the time of filing said petition and bond for removal filed in the said District Court of the Third Judicial District of the State of Idaho, in and for Ada County, its motion to quash the attempted service upon this defendant of summons and complaint. That upon the 4th day of March, 1937, the said District Court of the Third Judicial District of the State of Idaho, in and for Ada County, made and entered its order removing the above entitled cause from said State Court to this court, and that thereafter and within the time allowed by law a duly certified transcript prepared in accordance with law was filed in the above entitled court, and that in said transcript there appeared and was said motion by this specially appearing defendant, Manufacturers Trust Company, a corporation, to quash the service of summons and complaint. That said motion to quash the service of summons and complaint has never been submitted to this court for consideration or decision and the same is now pending in this court undisposed of.

III.

That on the 2nd day of June, 1937, the plaintiff herein applied to the Clerk of the above entitled court to have a clerk's default entered against the said defendant, Manufacturers Trust Company, a corporation, and on the 2nd day of June, 1937, the said Clerk acting by and through a deputy entered the default of the defendant, notwithstanding the fact that the said cause was pending upon the motion of the defendant, Manufacturers Trust Company, to quash the service of summons and complaint.

IV.

That the said default so entered on the 2nd day of June, 1937, was entered without authority of law, and during the time that there was a special appearance by this defendant for the purpose of having the service of summons and complaint quashed.

V.

That this honorable court has never acquired jurisdiction of this specially appearing defendant as appears from the motion to quash service of summons and complaint on file herein.

WHEREFORE, Hawley & Worthwine respectfully move that the default entered by the Clerk of this Court on the 2nd day of June, 1937, be set aside, annulled and vacated.

This motion is based upon the records and files in this action, including this motion.

Dated this 4th day of August, 1937.

Jess Hawley
Oscar Worthwine
HAWLEY & WORTHWINE
Residence: Boise, Idaho,
Attorneys for Defendant,
Manufacturers Trust Company

(Duly verified)

RETURN ON SERVICE OF WRIT

United States of America,)
..... District of Idaho)ss:

I hereby certify and return that I served the annexed
MOTION TO SET ASIDE DEFAULT on the therein-
named WILLIAM I. PHILLIPS.....

.....
.....
.....

by handing to and leaving a true and correct copy thereof
with Attorney for Plaintiff, S. T. Schreiber, (Who re-
fused to sign receipt accepting service of copy).....
personally at Boise, Idaho in said District on the 5th day
of August, A. D. 1937.

George A. Meffan
U. S. Marshal.
By Julia McCarter
Deputy.

(Title of Court and Cause)

MOTION TO SET ASIDE DEFAULT

Filed August 6, 1937

COMES NOW, the defendant above named, Alexander Lewis, by his attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of having the court set aside the default heretofore entered and the alleged service upon Alexander Lewis quashed, on the ground that the court was without jurisdiction to enter the said default, and not generally, or for any other purpose whatsoever, and does respectfully show the court:

I.

That the above entitled cause was filed in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, on the 8th day of February, 1937.

II.

That thereafter the defendant, Manufacturers Trust Company, a corporation, filed in said District Court its petition and bond for removal and on the 4th day of March, 1937, an order of removal was duly made and entered in said District Court in the above entitled cause, and thereafter and on the 19th day of March, 1937, a

transcript of the usual and proper papers on removal was filed in this court.

III.

That service of summons and complaint in this case was never made upon the said defendant, Alexander Lewis, by personal service or otherwise, but that on or about the 27th day of February, 1937, the plaintiff caused Lillian Campbell, the Auditor of Gem County, State of Idaho, as Auditor to register to the defendant, Alexander Lewis, a summons and a copy of the complaint to the said Alexander Lewis. That at no time since the institution of said suit in said state court has said Alexander Lewis been a resident of, or present in the State of Idaho, but has been a resident of the City of New York in the State of New York, and at all times has been absent from the State of Idaho and in the State of New York. That the only evidence of record in this cause of any attempted service upon Alexander Lewis is that on or about the 27th day of February, 1937, Lillian Campbell as Auditor of Gem County, State of Idaho, registered a copy of said summons and complaint to the said Alexander Lewis.

IV.

That on the 2nd day of June, 1937, the plaintiff herein caused the Clerk of this court to enter the default of the said Alexander Lewis. That the said default was wrongfully entered and entered without authority of law for the reason that no due, legal or any service of the summons or complaint was ever had upon Alexander Lewis,

and there is nothing in the record in this case upon which to base the entry of the default, in that :

1. There is no evidence in the record of personal service or any other service upon Alexander Lewis in the State of Idaho or in the District of Idaho.

2. There is no evidence in the record of service, personal or otherwise, upon the defendant, Alexander Lewis, outside the State of Idaho.

3. That the record affirmatively shows that Alexander Lewis was not a resident of or in the State of Idaho at any time since the filing of said action in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, and on the contrary the evidence and record shows that he was a resident of and in the State of New York at all the times since the filing of said action.

4. That there is no evidence in the record of an affidavit having been filed with the Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, in the above entitled cause, or at all, as required by Section 5-508 of the Idaho Code Annotated, 1932 Official Edition.

5. That no affidavit was filed with the Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, showing that the defendant, Alexander Lewis, resided out of the State of Idaho and could not be served within the State of Idaho,

and could not after due diligence be found within the State of Idaho, or concealed himself therein to avoid service of summons, or that he was a necessary and proper party to the action, or that a cause of action existed against the said defendant.

6. That no order was made by the Clerk of the District Court of the Third Judicial District of the State of Idaho in and for Ada County, as required by Section 5-508 of the Idaho Code Annotated, 1932 Official Edition, for publication of summons or for personal service of summons outside the State of Idaho in lieu of such publication.

7. That no order was entered in the above entitled cause by the Clerk or the Judge of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, directing the publication of summons to be made in a newspaper, nor was a newspaper designated to be the most likely to give notice to the defendant, nor was any order issued directing the publication of summons at least once a week for a full period of four weeks, at least twenty-six days intervening between the first and last publication of summons, nor was any order entered in said cause directing that a copy of summons and complaint be deposited within ten days in a post office directed to the person to be served at his last known address, all of which were required by Section 5-509 of the Idaho Code Annotated, 1932 Official Edition.

8. That there is no evidence in this record of per-

sonal service of summons upon the defendant, Alexander Lewis, by any sheriff, or an affidavit of any one else, or an affidavit of the printer, or an affidavit showing the deposit of a copy of the summons or complaint in the post office, or any affidavit of personal service outside of the state, or the written admission of service of the defendant.

9. That no service, personal or otherwise, of summons and complaint has been had upon the defendant, Alexander Lewis, other than the mailing of summons and complaint by Lillian Campbell, Auditor of Gem County, State of Idaho.

V.

That this honorable court did not have jurisdiction of the defendant, Alexander Lewis, at the time said default was entered, or at all.

VI.

That there is and was no evidence of record in this cause that any effort or attempt was made to serve the defendant, Alexander Lewis, with the process issuing out of this court, nor was any effort or attempt made to secure jurisdiction of said defendant, Alexander Lewis, in accordance with the statutes and rules of any federal court.

WHEREFORE, Hawley & Worthwine respectfully move that the default heretofore entered against the defendant, Alexander Lewis, be set aside, cancelled and

held for naught, and that the attempted service of summons on Alexander Lewis by mail by Lillian Campbell be quashed.

This motion is based upon the records and files in this action, including this motion.

Dated this 4th day of August, 1937.

Jess Hawley
Oscar Worthwine
HAWLEY & WORTHWINE
Residence: Boise, Idaho
Appearing specially for
Defendant, Alexander Lewis.

(Duly verified)

RETURN ON SERVICE OF WRIT

United States of America,)
..... District of Idaho)ss:

I hereby certify and return that I served the annexed
MOTION TO SET ASIDE DEFAULT.....
.....on the therein-named William I. Phillips
.....
.....

by handing to and leaving a true and correct copy thereof with Attorney for Plaintiff, S. T. Schreiber, (who refused to sign receipt accepting service of copy personal-

ly at Boise, Idaho in said District on the 5th day of August, A. D. 1937.

George A. Meffan
U. S. Marshal.

By Julia McCarter
Deputy.

(Title of Court and Cause)

MINUTES OF THE COURT OF SEP. 13, 1937

The motions of the defendants Manufactureres Trust Company and Alexander Lewis to set aside defaults heretofore entered against said defendants came on for hearing before the Court.

The motions were argued by O. W. Worthwine, Esquire, on the part of the defendants and S. T. Schreiber, Esquire, on the part of the plaintiff.

The matters were taken under advisement. The plaintiff was granted six days in which to file brief and the defendant the ten days following.

(Title of Court and Cause)

MINUTES OF THE COURT OF SEP. 30, 1937

The motions of the defendants to vacate and set aside the orders of defaults were further argued before the Court by counsel for the respective parties. The Court announced that he considered the sufficiency of the service submitted, together with the motion to vacate default and took the matters under advisement.

(Title of Court and Cause)

ORDER

Filed October 5, 1937

The motions of the defendants having been presented and argued by counsel, and after consideration of the same it is Ordered as follows:

1. That the motions of the defendants to vacate and set aside the default of the defendants entered by the Clerk of this Court are sustained.
2. That the motions of the defendants to quash the service of summons and complaint are sustained.

Dated October 5, 1937.

CHARLES C. CAVANAH
District Judge

(Title of Court and Cause)

OPINION

Filed October 5, 1937

S. T. Schreiber, Attorney for the Plaintiff,
Boise, Idaho.

Hawley & Worthwine, Attorneys for the defendants,
Boise, Idaho.

October 5th, 1937

CAVANAHA, District Judge

This action was removed to this Court from the State District Court and the motion of the plaintiff to remand was denied; thereafter on June 2, 1937, plaintiff filed praecipe for default of the defendants, which was entered by the Clerk and thereafter on July 6, 1937, moved that it be made final and the cause be set down for hearing.

On August 6, 1937 defendants filed separate motions to set aside default which present separate questions, namely:

1. In the motion of the defendant Manufacturers Trust Company it urges that at the time it filed its petition and bond on February 27, 1937, for removal of the cause to this Court it also filed motion to quash the attempted service of summons and complaint, upon it, which was not considered and determined by the State Court as the order removing the cause to this Court on March 4, 1937 was entered, and

2. That the default was entered by the Clerk of this

Court was without authority of law as there was pending a special appearance of the defendant to have the service quashed.

3. That the attempted service of Summons and Complaint upon the defendant Manufacturers Trust Company was not made in compliance with the laws of the State.

The motion of the defendant Alexander Lewis to set aside default urges:

1. That personal service of summons and complaint was never made upon him as the only evidence of record of any attempted service upon him is that on or about February 27, 1937, Lillian Campbell, as Auditor of Gem County, Idaho, registered copy of the summons and complaint to him and he asserts that the entry of the default was without authority of law in that; (a) That the record affirmatively shows that he was not at the time of filing the action and since, a resident of the State of Idaho, but a resident of the State of New York and that no affidavit was filed with the Clerk of the State Court showing that he resided out of the State of Idaho and could not be served within the State of Idaho, and could not, after due diligence be found within the State of Idaho, or concealed himself therein to avoid service or that he was a necessary party to the action, or that a cause of action existed against him, nor were orders made for the publication of summons or personal service of summons outside of the State of Idaho, in lieu of pub-

lication, being the steps required to be taken by Sections 5-507 to 5-509 I. C. A. inclusive, nor were there any efforts made to serve him with process issuing out of this Court.

Referring first to the motion of the defendant Manufacturers Trust Company, it appears that at the time of filing the removal papers, it had filed also a special appearance of the motion to quash service which has never been disposed of by either the State Court or this Court, and is still pending. The State Court made no order on ruling on the motion to quash. The mere fact that the State Court entertained the order of removal, it did not by so doing decide the motion of the defendant, Manufacturers Trust Company to quash the service, for under the Federal Statute and decisions of the Federal Courts it could not pass upon any question pending after the petition for removal and bond were filed, for the moment they were filed that Court had no further power or authority to consider the case, other than to sign the order of removal. Even should the State Court have decided, after the petition and bond to remove was filed, the motion to quash, such action would have been in contravention to the Federal Statute, as the Statute provides that when a petition and bond for removal are filed in the State Court it shall then be the duty of the State Court to accept the petition and bond and proceed no further in the suit, Title 28, Section 72 U. S. C. A. *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

At the time petition and bond for removal were filed

the Manufacturers Trust Company had also filed its special appearance of the motion to quash service of summons and complaint, which prevents a default being taken and the cause is transferred to this Court as it stood in the State Court.

This conclusion is reached by the Supreme Court of the United States when in interpreting the removal statute in the case of *Cain v. Commercial Publishing Company*, 232 U. S. 124, where it is said: "The weakness of plaintiff's contention is demonstrated not only when we consider all of the language of Section 29, but the language of Section 38, which provides that in all suits removed the district court shall proceed therein as if the suit had been originally commenced in the district court, 'and the same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal'. In other words, the cause is transferred to the district court as it stands in the state court and the defendant is enabled to avail himself in the latter court of any defenses, and, within the time designated, plead to the action 'in the same manner as if it had been originally commenced in said district court.' And these words, we have seen, were explicitly given such effect in the cited cases." *Carvey v. Compania Metaulergica Merricana*, 222 Fed. 732; *Higgins et al. v. California Prune and Apricot Growers*, 299 Fed. 810.

The interpretation of the removal statute is clearly stated in the *Encyclopedia of Federal Procedure*, Vol. 2,

page 211, as follows: "It is clear that the transfer of the suit to a United States court does not vacate what has been done in the State Court. The cause goes to the Federal Court laden with whatever proceedings have properly attached thereto before the transfer and the Federal Court will so far as possible recognize and give effect to them. It will so far as possible respect the process and notices in the State Court, such as a notice of intention to suffer a default or a notice of a motion to make the complaint more definite and certain. The Federal Court will proceed with the hearing of motions made in the State Court but undisposed of at the time of the removal, such as motions to dismiss, to quash or set aside process or service, to make the pleadings more definite and certain, or to resettle the form of an order on affirmance."

Obviously from what has been said as to the motion of the defendant Manufacturers Trust Company to set aside the default and to quash service of summons and complaint which is still pending, the default entered by the Clerk of this Court was without authority of law as that defendant was not in default and the same must be set aside, and the motion to quash the service is to be disposed of by this Court, and after considering the record and the provisions of the Statute of the State above referred to as to what steps are required to perfect service of summons and complaint, it is clear that the motion to quash the service of summons and com-

plaint attempted to be made upon the defendant Manufacturers Trust Company should be sustained.

Referring second to the motion of Alexander Lewis to set aside the default it is apparent from the record that the pretended service upon him was not made in the manner as required by the above provisions of the statute of the State which are applicable in making service in the present case.

This action is a personal one and the Court cannot acquire jurisdiction over the person of Alexander Lewis unless service is made upon him in the manner provided by law, as he is a resident of the State of New York, and therefore, the default so entered by the Clerk against him will be set aside.

Accordingly orders will be entered to meet the conclusions here reached.

(Title of Court and Cause)

MINUTES OF THE COURT OF OCT. 5, 1937.

Upon application of plaintiff's counsel the plaintiff was granted exceptions to the Court's order of this date, vacating and setting aside order of default, and quashing service of summons.

The plaintiff was granted twenty days in which to prepare and file proposed bill of exceptions.

(Title of Court and Cause)

BILL OF EXCEPTIONS

Filed October 20, 1937

Be it remembered at the September Term of this Court at Boise, Idaho, 1937, the Honorable Charles C. *Cavanaugh*, Judge of this said Court, presiding, the above entitled cause came on to be heard and the following proceedings were had, to-wit:

The motion of the Plaintiff to make the default judgment final, and the motion of the Defendants to set aside the default so entered by the Plaintiff, and to quash the service originally made in said action, came on for hearing, and argument of counsel for Plaintiff thereon and the argument of counsel for defendant opposed thereto as well, having been heard and considered, the Court denied the motion of the Plaintiff, and the motions of the Defendants to vacate and set aside the default entered by the Clerk of this Court were sustained; and secondly, the motions of the Defendants to quash service of summons and complaint were sustained, to which rulings in all things—counsel for plaintiff then and there duly reserved exceptions.

Inasmuch as the rulings and exceptions specified are requested to appear in a bill of exceptions in the record of said cause, I, Charles C. Cavanah, Judge of said

Court, who presided at the trial thereof, after due notice given by a copy delivered to the Defendants herein, have settled and signed the said bill, and have ordered that the same be made a part of the record of said cause this 20th day of October, 1937.

Charles C. Cavanah,
Judge.

Received and accept service of the above and foregoing bill of exceptions.

Hawley & Worthwine,
Attorneys for Defendants, appearing specially for said defendants and not generally and for the sole purpose of quashing service of summons and having defaults set aside.

(Title of Court and Cause)

NOTICE OF MOTION TO RECONSIDER ORDER
OVERRULING MOTION TO REMAND.

Filed October 21, 1937

TO HAWLEY AND WORTHWINE, ATTORNEYS
FOR DEFENDANTS:

Please take notice that the Plaintiff, William I. Phillips, will, on the 8th day of November, 1937, at the hour of ten o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard in the United States

Courthouse at Boise, Idaho, move the Court to reconsider order overruling the motion to remand the above entitled cause to the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, from which it was removed.

There is herewith served upon you a copy of the motion which will be presented to the Court at the time aforesaid, which said motion is to be considered as supported by the affidavit heretofore filed in the case of date April 27, 1937.

S. T. SCHREIBER,
Attorney for Plaintiff,
Residence, Boise, Idaho.

Received copy and accept service of the foregoing notice and the motion therein referred to.

Hawley & Worthwine,
Attorneys for Defendants,
Residence, Boise, Idaho.

(Title of Court and Cause)

MOTION TO RECONSIDER ORDER OVER-
RULING MOTION TO REMAND.

Filed October 21, 1937.

TO THE ABOVE ENTITLED COURT, THE HON-
ORABLE CHARLES C. *CAVANAUGH*, PRE-
SIDING:

Comes now the Plaintiff and respectfully moves the

Court for reconsideration of its order overruling Plaintiff's motion to remand said cause to the State Court on the grounds assigned as error :

1. That the Court is in error in overruling the motion heretofore presented, wherein its jurisdiction to try and determine this case was challenged.

2. The Court is in error in holding a present right of appeal from such order exists, and basing his order in part on such position.

3. The Court is in error in not considering and passing on the question of the defendant corporation, The Manufacturers' Trust Company, doing business in the State of Idaho.

4. And the Court is in error in holding inferentially that the action is a separable controversy.

5. And the Court erred in holding that the service in the State Court was not sufficient according to statute, and erred in quashing the same against both defendants.

WHEREFORE: Plaintiff avers that the Court has not jurisdiction to try and determine this cause and prays that its former order may be overruled, and that the cause be remanded to the Third Judicial District Court of the State of Idaho from which it came.

S. T. SCHREIBER,
Attorney for Plaintiff,
Residence, Boise, Idaho.

(Duly verified)

Received a copy and accept service of the above and foregoing motion this 21 day of October, 1937.

Hawley & Worthwine,
Attorneys for Defendants,
Residence, Boise, Idaho.

(Title of Court and Cause)

AFFIDAVIT IN SUPPORT OF MOTION TO RE-
CONSIDER ORDERS OVER-RULING
MOTIONS TO REMAND.

Filed January 3, 1938.

AFFIDAVIT OF ROBERT W. CLARK.

UNITED STATES OF AMERICA)
For the District of Idaho) ss.
Southern Division, ADA COUNTY.)

I, Robert W. Clark, of Boise, Ada County, Idaho, de-
pose and say that I am Robert W. Clark who is the affiant
herein; that I am forty years of age, a married man, and
have a family and reside at 1302 North 21st Street, Boise
City, that I am a truck driver and am so engaged in truck-
ing, and have been for a number of years so engaged, and

am employed by the Stunz Lumber Company of Horse Shoe Bend, Idaho.

That on about the 15th day of June, 1937, one Fred Turner, superintendent of the Lincoln Mine, came to the office of the Stunz Lumber Company at Horse Shoe Bend and ordered lumber to be delivered at the Lincoln Mine at Pearl, Idaho, of the following dimensions: June 16, 1937, he ordered, and I delivered 2,939 feet of dimension lumber as follows: 6 x 6s, 16 feet long; 2 x 6s, 16 feet long; 1 x 12s, 16 feet long; and 2 x 4s, 16 feet long; that again on August 21, 1937, Mr. Turner ordered, and I delivered to the Lincoln Mine 3,700 feet of the following dimensions: 6 x 6s, 16 feet; 2 x 6s, 16 feet; 1 x 12s, 16 feet; and 2 x 4s, 16 feet; that on December 5, 1937, Mr. Turner ordered for the Lincoln Mine and I delivered the same at Pearl, Idaho, 3,300 feet of the following dimensions: 6 x 6s, 16 feet; 2 x 6s, 16 feet; 1 x 12s, 16 feet; and 2 x 4s, 16 feet; the 6 x 6s, 16 feet and the 2 x 4s, 16 feet were red fir. The 1 x 12s, 16 feet were pine. In 1936 I also delivered two loads of about 3,300 each of 6 x 6s, 16 feet; 2 x 6s 16 feet; 1 x 12s, 14 feet; and 2 x 4s, 16 feet, but I do not remember the specific date that I delivered these two loads. All of the lumber was bought by Mr. Turner and he paid for it so we do not have the invoices. Mr. Turner informed me that he wanted some for "duck boards" and the 1 x 12s in the mine and the 2 x 4s for "collar braces" in the mine. The payments Mr. Turner made aggregated between seventy and eighty dollars for each load, and he informed me that

he wanted the lumber immediately as he had a man or two working with him.

I delivered the first load to the Luella shaft where they were working at the time. Mr. Turner gave me another order for about 8,000 feet of 2 x 4s and 6 x 6s, and when I delivered the first order Turner said, "I do not want any more, they may sell out, but I'll take this load anyway. If they sell the mine I'll be out of a job." He meant by "they", as nearly as I could learn and understand, the Manufacturers Trust Company. There were several families living at the mine at the time I was delivering the lumber. And further affiant sayeth not.

ROBERT W. CLARK.

Subscribed and sworn to before me, a Notary Public for Idaho, this 31st day of December, 1937.

(Seal) JAMES S. BOGART,
Notary Public,
Residing at Boise, Idaho.

Received copy of foregoing affidavit.

JESS HAWLEY,
Attorney for Defendants.

OSCAR W. WORTHWINE,
Attorney for Defendants.

(Title of Court and Cause)

MINUTES OF THE COURT OF JANUARY 5, 1938

The plaintiff's motion for reconsideration of the order overruling the plaintiff's motion to remand the case to the State Court came on for hearing before the Court with counsel for the respective parties.

The defendant's counsel moved the Court to deny the plaintiff's motion. After hearing respective counsel, the Court denied the application for reconsideration, and granted the plaintiff exceptions to the order.

(Title of Court and Cause)

EXCEPTIONS TO RULINGS.

Filed January 7, 1938.

BE IT REMEMBERED that on this day, TO-WIT:

January 5, 1938, came on to be heard the plaintiff's "Motion to reconsider order over-ruling motion to Remand" the above entitled action #1971, to the State Court from whence it was removed, and the Court having bade Counsel, Attorney for Plaintiff to proceed with argument thereon, and as attorney for plaintiff was reading his motion and stating his propositions of law, Attorney for defendants arose and objected to the consideration thereof, and at the suggestion of the Court offered a motion stating that the Court had already passed upon the Questions to be presented by the Attorney for plaintiff, in his motion, and the Court then and there ruled and sustained

the motion and objections of defendants, and plaintiff was thereby unable to present his case, to which rulings of the Court in all things plaintiff then and there excepted, and hereby tenders his Bill of Exceptions, requesting that same be made a part of the record, because none of said matters otherwise appear, and it is prayed that these his exceptions be signed, allowed, and approved, and made a part of the record pursuant to rules, and practice in such case made and provided; and is accordingly done.

CHARLES C. CAVANAH,
District Judge.

Dated this 7th day of January, 1938.

(Title of Court and Cause)

ANOTHER SUMMONS
Filed February 7, 1938

THE PRESIDENT OF THE UNITED STATES
OF AMERICA

To the above-named Defendants:

You are hereby notified that a complaint has been filed against you in the District Court of the United States for the District of Idaho, Southern Division, by the above-named plaintiff, and you are hereby directed to appear and plead to the said complaint within twenty days of the service of this summons; and you are further notified that unless you so appear and plead to said complaint

within the time herein specified, the plaintiff will take judgment against you as prayed in said complaint, a copy of which is attached hereto, served herewith, and made a part hereof.

And this is to command you, the Marshal of said District, or your deputy, to make due service and return of this Summons. Hereof fail not.

WITNESS, The Honorable CHARLES C. CAVANAUGH, Judge of the District Court of the United States, and the seal of said Court affixed at Boise, in said District, this 5th day of February, 1938.

(SEAL)

W. D. McReynolds, Clerk.

S. T. Schreiber,
Attorney for Plaintiff,
Residence: Boise, Ida.

Boise, Idaho

February 5, 1938

United States of America,)
District of Idaho) ss.

I hereby certify and return that I received the annexed Summons on the 5th day of February, 1938, and I further certify that I personally served the same on the 5th day of February, 1938 on the Manufacturers Trust Company, a corporation, one of the defendants named in said summons by delivering to and leaving with Lillian M. Campbell, County Auditor of Gem County, Idaho, personally at Emmett, County of Gem, State of Idaho, a

copy of said summons, together with a copy of the complaint in said action attached to said copy of summons. The defendant, Manufacturers Trust Company, a corporation, is a foreign corporation and does not have a designated person or agent actually residing in Idaho upon whom process can be served and the Secretary of State of the State of Idaho states that the said defendant, Manufacturers Trust Company, has not filed designation of agent in his office.

I further certify that after due and diligent search I am unable to locate Alexander Lewis, one of the defendants named in said summons within the District of Idaho.

I further certify that later I mailed copy of summons, with copy of complaint attached, to Lillian M. Campbell, Auditor and Recorder of Gem County, to be mailed to Alexander Lewis, at 45 Broad Street, New York City, N. Y.

GEORGE A. MEFFAN,
U. S. Marshal.

By JULIA McCARTER,
Deputy.

(Title of Court and Cause)

ANOTHER SUMMONS

Filed February 8, 1938

THE PRESIDENT OF THE UNITED STATES
OF AMERICA

To the above-named Defendants:

You are hereby notified that a complaint has been filed against you in the District Court of the United States for the District of Idaho, Southern Division, by the above-named plaintiff, and you are hereby directed to appear and plead to the said complaint within twenty days of the service of this summons; and you are further notified that unless you so appear and plead to said complaint within the time herein specified, the plaintiff will take judgment against you as prayed in said complaint, a copy of which is attached hereto, served herewith, and made a part hereof.

And this is to command you, the Marshal of said District, or your deputy, to make due service and return of this Summons. Hereof fail not.

WITNESS, The Honorable CHARLES C. CAVANAHA, Judge of the District Court of the United States, and the seal of said Court affixed at Boise, in said District, this 8th day of February, 1938.

(SEAL)

W. D. McREYNOLDS, Clerk.

Lona Manser, Deputy Clerk.

Attorney for Plaintiff:

S. T. SCHREIBER,

Residence, Boise, Idaho.

United States of America) ss.
District of Idaho)

I hereby certify and return that I received the annexed summons in the case of William I. Phillips, Plaintiff vs. Manufacturers Trust Company, a corporation, and Alexander Lewis, Defendants, on the 8th day of February, 1938, and after diligent search I am unable to find any managing or business agent, cashier, secretary, or officer, or any station, or ticket agent of said corporation or designated person in the county where the action is commenced within the State and District of Idaho upon whom service may be made.

I further certify that the said Manufacturers Trust Company, a corporation, is a foreign corporation and has not complied with the constitution and laws so made and provided relative to foreign corporations doing business in the State of Idaho; that the said corporation is conducting a mining business in Gem County, State of Idaho, and does not have any managing or business agent, cashier, secretary, or officer, or any station, or ticket agent, or designated person, within the said Gem County where doing business, upon whom service can be made.

I further certify that the Defendant, Alexander Lewis does not reside in the county where the action is brought and is a non-resident of the State of Idaho, District of Idaho.

George A. Meffen,
U. S. Marshal.

By Julia McCarter,
Deputy.

Dated at Boise, Idaho, this 8th day of February, 1938.

(Title of Court and Cause)

AFFIDAVIT FOR ORDER TO PERFECT
SERVICE.

Filed February 8, 1938.

State of Idaho)
County of Ada) ss.

WILLIAM L. PHILLIPS, being first duly sworn says: that he is the plaintiff in the above entitled action; that the complaint in said action was filed with the Clerk of the Court in Third Judicial District of the State of Idaho in and for Ada County on the eighth day of February, 1937 and summons thereupon issued; that said action is an action in fraud and is brought to recover damages in the sum of \$500,000 dollars. The cause of action is more particularly set out in the complaint to which reference is made. That the said defendants reside without the state, to-wit: In the State of New York, and cannot after due diligence be found within this state; that the said foreign corporation, Manufacturers Trust Company is a necessary party and has not complied with the constitution and laws of the State of Idaho, and has no agent, managing or business agent, cashier, secretary or any

station or ticket agent of said corporation in the County where action is commenced within the state upon whom service may be made; that the said defendant, Alexander Lewis, resides in the State of New York; that he is also a proper party defendant and this affiant in support thereof states the following facts and circumstances: That affiant for the purpose of finding said defendants and ascertaining the place of residence has made due and diligent inquiry and search relative to finding an officer or statutory agent or business agent, cashier or secretary, or any station, ticket or other agent of the defendant corporation and is informed and believes from such information that the said corporation has been doing business in the State of Idaho contrary to and in violation of the Constitution and laws so made and provided, relative to foreign corporations doing business in the State, and did not appoint an agent upon whom service may be made in case of suit or action be instituted against it, that the said corporation is conducting a mining business in Gem County, State of Idaho, to-wit: The Lincoln mines and was so operating and doing business at the time of bringing said suit in the State Court, but which was subsequently removed to this Court upon petition of the defendant, that the said defendant, Alexander Lewis, is a resident and inhabitant of New York, and resides without the State and District of Idaho where plaintiff resides; affiant therefore says that personal service of said summons cannot be made on said defendants; AND PRAYS FOR AN ORDER that service of said summons be made upon the auditor of Gem

County, Idaho, and copies thereof mailed to an officer or agent of the said corporation in the State of New York at 55 Broad St., City of New York, and a copy be deposited in the mail by the said auditor directed to the defendant, Alexander Lewis, at his place of residence, to-wit: at the City of New York at 45 Beaver Street, or in care of Manufacturers Trust Co., at its office, and a registered receipt returned therefore showing delivery to addressee only.

WILLIAM I. PHILLIPS.

Subscribed and sworn to before me, a Notary Public in and for the State of Idaho, this 5th day of February, 1938.

(SEAL)

G. J. GARDNER,
Notary Public,
Residing at Boise, Idaho.

My Commission expires Dec. 9, 1941.

(Title of Court and Cause)

ORDER.

Filed Feb. 8, 1938.

Upon filing of affidavit in this action, and it appearing therefrom and upon the return of the Marshal, and good cause being shown therefore, it is hereby ordered that the Clerk of this Court issue summons under seal against the

defendants, and that the same be served by the United States Marshal according to law; and that the defendants appear and plead to the complaint within forty days from the date of service.

Dated this 8th day of February, 1938.

Charles C. Cavanah,
District Judge.

(Title of Court and Cause)

ANOTHER SUMMONS

Filed March 16, 1938

THE PRESIDENT OF THE UNITED STATES
OF AMERICA

To the above-named Defendants:

You are hereby notified that a complaint has been filed against you in the District Court of the United States for the District of Idaho, Southern Division, by the above-named plaintiff....., and you are hereby directed to appear and plead to the said complaint within forty days of the service of this summons; and you are further notified that unless you so appear and plead to said complaint within the time herein specified, the plaintiff..... will take judgment against you as prayed in said complaint, a copy of which is attached hereto, served herewith, and made a part hereof.

And this is to command you, the Marshal of said District, or your deputy, to make due service and return of this Summons. Hereof fail not.

WITNESS, The Honorable Charles C. Cavanah, Judge of the District Court of the United States, and the seal of said Court affixed at Boise, in said District, this 8th day of February, 1938.

(SEAL) W. D. McREYNOLDS,
Clerk.
Vivian Reasor,
Deputy Clerk.

Attorney for Plaintiff:

S. T. SCHREIBER

Residence:

Boise, Idaho.

United States of America)
District of Idaho) ss.

I hereby certify that I received the within summons on the 9th day of February, 1938, and personally serviced the same on the 9th day of February, 1938, on the Manufacturers Trust Company, a corporation, and Alexander Lewis, the defendants named in said summons, by delivering to Lillian M. Campbell, Auditor and Recorder of Gem County, personally at Emmett, Idaho, a copy of said Summons, together with a copy of the complaint in said action attached to said copy of Summons.

I further certify that I left with Lillian M. Campbell,

Auditor and Recorder of Gem County, personally at Emmett, Idaho, two copies of said Summons together with copies of the complaint in said action attached to said copies of Summons to be mailed to the Manufacturers Trust Company, a corporation, and Alexander Lewis, defendants named in said Summons. Affidavit of County Recorder, Lillian M. Campbell, is attached hereto and made a part of this return.

George A. Meffan
U. S. Marshal
By Julia McCarter
Deputy.

Dated at Boise, Idaho, this 14th day of March, 1938.

STATE OF IDAHO) ss.
COUNTY OF GEM)

I, Lillian M. Campbell, Clerk of the District Court, Gem County, Idaho, do hereby certify that in compliance with a request of Mr. George A. Meffan, U. S. Marshal of Boise, Idaho, I mailed on February 14, 1938, a summons with a copy of complaint attached in the case of William I. Phillips vs. Manufacturers Trust Company and Alexander Lewis, by registered mail, addressee only, to Alexander Lewis at 45 Broad St., New York City, New York: that on February 21st, 1938, a registered receipt was returned to the Postmaster at Emmett, Idaho, advising that said Alexander Lewis could not be found at said address; that on that same date I informed Mr.

Geo. A. Meffan, U. S. Marshal, of this fact and on February 25, 1938, I received a letter from said U. S. Marshal giving me another address which I gave to the Postmaster at Emmett, Idaho, to be forwarded to the Postmaster in New York City which was as follows: Alexander Lewis, 45 Beaver St., or c/o Manufacturers Trust Company at 55 Broad St., New York City, addressee only; that on March 2nd, 1938, the envelope containing the summons and copy of complaint, together with registered return receipt marked "Returned to sender" was received at this office and which I returned this date to Mr. George A. Meffan, U. S. Marshal, at his request.

I further certify that on March 2nd, 1938, I mailed at the request of Mr. George A. Meffan, U. S. Marshal, a summons and copy of complaint in the case of William I. Phillips vs. Manufacturers Trust Company and Alexander Lewis to Manufacturers Trust Company at 55 Broad Street, New York City, New York, by registered mail, addressee only, and on this date, March 10th, 1938, a registered return receipt was received at this office with a time stamp and the words Manufacturers Trust Company stamped on same and a signature written in ink which is not legible, which said return receipt is returned on this date to Mr. George A. Meffan, U. S. Marshal, Boise, at his request.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of March, 1938.

(SEAL)

Lillian M. Campbell,
County Auditor, Gem County, Idaho.

(Title of Court and Cause)

MOTION TO QUASH SERVICE OF SUMMONS
AND COMPLAINT.

Filed March 23, 1938

COMES NOW, the defendant, Manufacturers Trust Company, a corporation, by its attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of quashing the purported service and the jurisdiction of the court under said attempted service, and not generally, or for any other purpose whatsoever, and does respectfully show the court:

I.

That Manufacturers Trust Company is a corporation created, organized, and existing under and by virtue of the laws of the State of New York, and is a resident and citizen of the State of New York; that the said corporation is not now, or at any other time has it been doing business in the State of Idaho.

II.

That service of summons and complaint in this case has never been made upon the said defendant, Manufacturers Trust Company, by personal service or otherwise, but that on or about the 9th day of February, 1938, the plaintiff caused a copy of the said summons and complaint in

this case to be served upon Lillian Maude Campbell, Auditor and Recorder of Gem County, State of Idaho, at her office in the Court House in Emmett, Idaho. That the said Auditor and Recorder above named was not on the 9th day of February, 1938, or at any other time, and is not now the agent or business agent transacting business for said Manufacturers Trust Company, a corporation, in the State of Idaho, or elsewhere.

That said defendant, Manufacturers Trust Company, was not on the said 9th day of February, 1938, or at any other time, and is not now doing business in the State of Idaho, and that the purported service of summons and complaint in this case upon the said Lillian Maude Campbell, as Auditor and Recorder of Gem County, State of Idaho, did not constitute service thereof upon the said defendant corporation; that it is not and has not been served with summons and complaint in this action as provided by law.

III.

That this Honorable Court, therefore, does not have jurisdiction of the defendant corporation, Manufacturers Trust Company.

WHEREFORE, Hawley & Worthwine respectfully move that the purported service of summons and complaint on the defendant, Manufacturers Trust Company, a corporation, be quashed.

This motion is based upon the records and files in this action, including this motion.

Dated this 23rd day of March, 1938.

Jess Hawley
HAWLEY & WORTHWINE
Residence: Boise, Idaho,
Attorneys for Defendant,
Manufacturers Trust Company,
a corporation,
appearing specially.

(Duly verified)

(Title of Court and Cause)

AFFIDAVIT OF MAILING

Filed March 23, 1938.

STATE OF IDAHO,)
County of Ada.) ss.

LITHA WENTZ, being first duly sworn, deposes and says:

That she is a citizen of the United States over the age of twenty-one years; that she is a clerk and stenographer employed at Boise, Idaho, by Hawley & Worthwine, attorneys; that upon the 23rd day of March, 1938, at the request of Jess Hawley, a member of said firm, she de-

posited in the United States Post Office at Boise, Idaho, postage prepaid, and caused to be registered to S. T. Schreiber, 1802 N. 8th Street, Boise, Idaho, a copy of the attached Motion to Quash Service of Summons and Complaint in the above entitled cause. That said envelope containing said paper was securely sealed and had sufficient postage thereon to carry the same by registered mail to the above named person at his address.

Litha Wentz.

Subscribed and sworn to before me this 23rd day of March, 1938.

(SEAL)

Walter G. Bell
Notary Public for Idaho
Residing at Boise, Idaho.

(Title of Court and Cause)

NOTICE TO TAKE UP AND TO DETERMINE,
“MOTION TO QUASH SERVICE OF
SUMMONS AND COMPLAINT”.

Filed April 8, 1938.

TO HAWLEY AND WORTHWINE, ATTORNEYS
FOR DEFENDANT:

MANUFACTURERS' TRUST COMPANY, (a corporation)

Please take notice that the Plaintiff, William I. Phil-

lips, will, on the 15th day of April, 1938, at the hour of ten o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard in the United States Court-house at Boise, Idaho, move the Honorable Court to take up the motion of the defendant to quash service of "summons and complaint" for hearing, heretofore filed.

S. T. Schreiber,
Attorney for Plaintiff.
Residence, Boise, Idaho.

Received copy and accept service of the foregoing notice this 8th day of April, 1938.

HAWLEY AND WORTHWINE,
By Oscar W. Worthwine,
Attorneys for Defendants.
Residence, Boise, Idaho.

(Title of Court and Cause)

MOTION FOR DEFAULT

Filed April 8, 1938

TO THE HONORABLE CHARLES C. CAVANAUGH,
JUDGE:

Comes now the Plaintiff, William I. Phillips, by his Attorney, and moves the Court to enter up default of the MANUFACTURERS' TRUST COMPANY (a cor-

poration), Defendant, for failure to answer or plea to PLAINTIFF'S complaint filed, and for want of a sufficient affidavit of defense.

S. T. SCHREIBER,
Attorney for Plaintiff,
Residence, Boise, Idaho.

Received copy and accept service of the foregoing motion this 8th day of April, 1938.

HAWLEY & WORTHWINE
By Oscar W. Worthwine,
Attorneys for Defendants,
Residence, Boise, Idaho.

CITY OF NEW YORK
DEPARTMENT OF HEALTH
BUREAU OF RECORDS

New York, N. Y. APR -6 1938

Below is a photostatic copy of a certificate on file in the Bureau of Records of the Department of Health of the City of New York.

BUREAU OF RECORDS
DEPARTMENT OF HEALTH
BOROUGH OF MANHATTAN

937 SEP 7 PM 2 42

1 Place of Death
BOROUGH OF MANHATTAN

No. 127 West 82 St.

Character of premises,
whether tenement, private, hotel, etc. Tenement
(If institution, state name.)

18919

19919

Certificate No.

2 FULL NAME (PRINT) Alex Lewis
First Name Middle name Last name

3 Residence (usual place of abode)
(If nonresident, give place and State) No. 127 W. 82nd St. Borough Manh

PERSONAL AND STATISTICAL PARTICULARS

4 SEX 5 COLOR OR RACE 6 SINGLE, MARRIED,
Male White WIDOWED, OR
DIVORCED (Write
6a WIFE) OF the word)
HUSBAND Single

7 DATE OF BIRTH (Month) (Day) (Year)
OF DECEASED , 1

8 AGE OF DECEASED If less
45 yrs. ___ mos. ___ das. day ___ hrs
or ___ min?

9 O A Trade, profession or particular
C kind of work done, as spinner,
C sawyer, bookkeeper, etc. Lawyer
U B Industry or business in which
P work was done, as silk mill,
A sawmill, bank, etc.

T C Date deceased last worked at
I this occupation D. Total time (years)
O (month and year) spent in this
N 1936 occupation 20 yrs.

10 BIRTHPLACE (State or Country) U. S.
11 How long in U. S. (if of for-
12 How long resident
in City of New
York Life

13 NAME OF FATHER Isaac
OF DECEASED

14 Birthplace OF FATHER
OF DECEASED Russia, Poland

15 MAIDEN NAME (State or County) Russia, Poland
OF MOTHER Sarah Posner

16 BIRTHPLACE OF MOTHER OF DECEASED (State or Country)
Russia, Poland

17 INFORMANT Police

21 PLACE OF BURIAL WASHINGTON CEMETARY

22 UNDERTAKER River Side Memorial Chapel Inc.
Van Omen

BUREAU OF RECORDS DEPARTMENT OF HEALTH

THOMAS J. DUFFIELD Registrar of Records

DATE OF BURIAL SEPT. 8th, 1937

ADDRESS 180 West 76 A

CITY OF NEW YORK.

This is to certify that the foregoing is a true copy.

(JOHN T. WALSH, M.D.)
Assistant Registrar of Records

NOTICE: In issuing this transcript of Record, the Department of Health of the City of New York does not certify to the truth of the statements made thereon, as no inquiry as to the facts has been provided by law.

WARNING: DO NOT ACCEPT THIS TRANSCRIPT UNLESS THE RAISED SEAL OF THE DEPARTMENT OF HEALTH IS AFFIXED THEREON.

MEDICAL CERTIFICATE OF DEATH

18 Date of Death Sept 4 1937
(month) (date) (year)

19 I certify that I have this 4 day of Sept, 1937, taken charge of the body of deceased found at residence and that I have investigated the essential facts concerning the circumstances of the death.

20 I further certify that I have viewed said body and from examination and evidence, that he died on the 4 day of Sept 1937, at A. M., and that the chief and determining cause of his death was Augira pectoris and coromary sclerosis that the contributing causes were

Charles B. Loman, M. D.
Assistant Medical Examiner
Approved

Thomas A. Gough M. D.
Chief Medical Examiner.

(Title of Court and Cause)

AFFIDAVIT OF WILLIAM I. PHILLIPS IN OPPOSITION OF MOTION TO QUASH "SERVICE OF SUMMONS AND COMPLAINT", AND TO ENTER DEFAULT.

Filed April 15, 1938.

STATE OF IDAHO)
 COUNTY OF ADA.) ss.

William I. Phillips being duly sworn, deposes and says: That I am William I. Phillips, the plaintiff in the above entitled action which was instituted in the District Court of the Third Judicial District in the State of Idaho in and for the County of Ada, on the 8th day of February, 1937, and removed by defendants to this Court, and that the said action is in tort, brought for damages by reason of fraud on the part of the defendants, MANUFACTURERS TRUST COMPANY, (a Corporation), and one ALEXANDER LEWIS, both of the City and State of New York. That the said defendant MANUFACTURERS TRUST COMPANY, (a Corporation), entered the State of Idaho to do business on or about....., 1923, and at numerous times has transacted business in Idaho through its officers and agents, and has purchased property and taken title thereto, and has attempted to convey title to properties so acquired without first com-

plying with the Constitution and the Laws of the State of Idaho, and has in violation of the Constitution and Statutes repeatedly done business, directly or indirectly through various agents, attorneys, and representatives, and evading the laws and the statutes in this behalf; that the said corporation has made various misrepresentations and false statements at numerous times, and is evading the law through its officers and agents who are acting for, and in behalf of said defendant. That the suit and action in this instance is by reason of fraudulent acts committed on or about the 19th day of November 1931, in which it caused to make and did make void and fraudulent option and lease, and collected royalties upon the premises described in plaintiff's complaint, to which reference is hereby made, and made a part of this affidavit; that since that time it has many times and continuously is doing business in the State of Idaho as is more particularly shown by the following affidavits, to-wit:—No. 1, William I. Phillips, No. 2, James Baxter, No. 3, Ralph Shaffer, No. 4, J. W. Crow, No. 5, Truman Joiner, No. 6, Fermin J. Arnold, No. 7, Robert W. Clark, No. 8, J. A. Jones, and No. 9, the affidavit of the affiant herein, including also the death certificate of the defendant, ALEXANDER LEWIS, which is made a part of this affidavit, and certifies that the said Lewis died on September 4, 1937, in the City of New York, and did not die in December 1937, as set out in the affidavit of James L. Fozard, who claims he is a Vice President of the MANUFACTURERS TRUST CO., and whose affidavit in

this connection with other matters set out therein, is absolutely erroneous and false in that behalf. Affiant further state that in a certain action wherein the MANUFACTURERS TRUST CO. and ALEXANDER LEWIS were defendants in this Court; One J. Lawrence Gilson, a witness, called for cross-examination, under the Statute, having been duly sworn, testified as follows: "The name is J. Lawrence Gilson. I reside in New York City, and I am Vice President of the Defendant MANUFACTURERS TRUST CO., I have occupied that position since April 1, 1931, but I was not connected with the MANUFACTURERS TRUST CO., or any of the banks which have merged into MANUFACTURERS TRUST CO., prior to that date. In my capacity as Vice President of the MANUFACTURERS TRUST CO., I have been generally in charge of the affairs of the MANUFACTURERS TRUST CO. in connection with the Lincoln Mine, etc."

"Alexander Lewis is employed by our Bank in the Real Estate Department. He is not an officer or director of the Company, simply an employee. I do not know how long he has been employed in the Bank. Two of the claims adjoining the Lincoln Mine *was* patented, in 1931. On the 2nd day of February 1934 in New York City, at 160 Broadway, I was asked the following questions." Q. The application for patent and all expense, both legal and otherwise, in that connection, were borne by the MANUFACTURERS TRUST CO., were they not? To which I answered, Yes. To explain that answer, very

soon after, I went to work for the Bank, there was turned over to me a letter coming directly from Mr. Brasie, saying the patent had been taken over. He was employed by the Bank to secure the patent. Patents were applied for in the name of ALEXANDER LEWIS, but were actually for the benefit of the MANUFACTURERS TRUST CO., and all expenses and costs were paid for by the MANUFACTURERS TRUST CO., The MANUFACTURERS TRUST COMPANY was the real party in interest.”

“The MANUFACTURERS TRUST CO., at all time prior to that date, since 1923, had been the real owner of the Lincoln Mine, in Gem County, Idaho.” The MANUFACTURERS TRUST CO., whose address is 55 Broad Street, New York City, have received royalty payments and are also working the Lincoln Mine in Gem County, Idaho, at the present time. They also have a State Compensation Insurance Policy in effect at the present time in the name of ALEXANDER LEWIS. Neither Lewis or the Trust Company have made any annual reports to the State Mine Inspector.

The preceding excerpts and quotations were taken verbatim from the transcript of the record in the case of Ojust Mining Company, (a corporation), vs. Manufacturers Trust Company, (a corporation), and Alexander Lewis, respondents; heretofore tried in this Court and appealed to the Circuit Court of Appeals.

At page 129, 130, and at page 131. The following

questions were propounded to one, Louis S. Posner, of the MANUFACTURERS TRUST CO., as follows: Q. It is a fact, is it not, Mr. Posner, that the MANUFACTURERS TRUST CO., for reasons based upon the financial statements which they, from time to time, present to their Board of Directors and Stockholders, did not desire to appear of record as the owner of mining property situated in a State where they were not legally qualified to do business? To which answer was made, as follows: A. No, I would say that was not the fact which lead to the taking of this deed in the name of Mr. Lewis, but it is impossible for me to reconstruct now, the thoughts which lead to a particular act some eleven years ago."

On page 132, the witness states, "I cannot tell you now why this property was taken in the name of the individual ALEXANDER LEWIS, rather than in the name of the real parties in interest."

And further affiant sayeth not.

William I. Phillips.

Subscribed and sworn to before me, a Notary Public, this 13th day of April, 1938.

(SEAL)

G. J. Gardner,

Notary Public for Idaho, Boise, Idaho.

My Comm. expires 12/9/41

(Title of Court and Cause)

AFFIDAVIT OF MR. J. A. JONES

Filed April 15, 1938

STATE OF IDAHO)
COUNTY OF ADA)ss:

J. A. Jones first being duly sworn on oath, deposes and says, that he is Auditor in the office of the State Insurance Fund, of the State of Idaho, and as such officer has charge of the records and files in said office, that one ALEXANDER LEWIS of 55 Broad Street, New York City, New York, carries a Policy in the State Insurance Fund; that the Policy issued to ALEXANDER LEWIS, covers workmen employed at the Lincoln Mine in Gem County, Idaho, and that said Policy is now in force, and the premium thereon, has been paid on March 11th, 1938 by check, and a letter requesting that a receipt therefore be returned to ALEXANDER LEWIS on that date, and further affiant sayeth not.

J. A. Jones, Auditor

Subscribed and sworn to, before me, a Notary Public for the State of Idaho this 12th day of April, 1938.

Alice O. Ray

(SEAL)

Notary Public for Idaho

Residence, Boise, Idaho.

DEED

Filed April 15, 1938

Instrument No. 14598

THIS INDENTURE, Made this 10th day of May,

in the year of our Lord One Thousand Nine Hundred and Twenty-three, between W. H. Hutchings and Ella E. Hutchings, his wife, and J. H. Richards and Fannie H. Richards, his wife, of Boise, Idaho, the parties of the first part, and ALEXANDER LEWIS of Forest Hills, Long Island, New York City, N. Y., the party of the second part.

WITNESSETH: That the said parties of the first part, for and in consideration of the sum of Thirty Thousand (\$30,000) Dollars, lawful money of the United States of America, and other valuable considerations, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do GRANT, BARGAIN, SELL and CONVEY unto the said party of the second part, and his heirs and assigns forever, the following described real property, to wit:

The three patented mining claims known as the Lincoln Group, consisting of the Lincoln Lode Mining Claim, the Alice Lode Mining Claim, and the Lookout, (sometimes known as the Outlook) Lode mining Claim, all situated in the West View Mining District in Gem County (formerly Canyon and Boise Counties), State of Idaho, and heretofore conveyed to the Lincoln Mining Company, Limited, by United States Patent No. 39067, dated June 20th, 1904, and recorded September, 6th, 1904, in Book 2 of Patents, at Page 46, in the records of

Canyon County, State of Idaho, and for a more particular description of said group of Patented Mining Claims, reference is hereby made to the said record of the same, such description in said record being made a part hereof :

And also the Annie Laurie Lode Mining Claim, not patented, situated in said West View Mining District, and lying immediately south of and adjoining the said Lincoln Lode Mining Claim.

And also the North Lincoln Lode Mining Claim, not patented, situated in said West View Mining District, and lying immediately north of and adjoining the said Lincoln Lode Mining Claim.

TOGETHER with all dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges and franchises thereto incident, appendent and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, their heirs and assigns forever.

IN WITNESS WHEREOF, the said parties of the

first part have hereunto set their hands and seals the day and year first above written.

(\$30.00 I. R. Stamps canceled)

Signed, Sealed and Del-	W. H. Hutchings (SEAL)
ivered in the presence of	J. H. Richards (SEAL)
McKeen F. Morrow	Fannie H. Richards
J. L. Eberle	Ella E. Hutchings

STATE OF IDAHO)ss:
COUNTY OF ADA)

On this 10th day of May, in the year 1923, before, me a Notary Public in and for said County, personally appeared, W. H. Hutchings, and J. H. Richards, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official Seal, the day and year in this certificate first above written.

(SEAL)

J. L. Eberle
Notary Public
Residence: Boise, Idaho

STATE OF IDAHO)
COUNTY OF ADA)ss:

On this 3rd day of July, 1923, before me, G. B. Thomas, a Notary Public in and for said county and State personally appeared Fannie H. Richards, wife of

J. H. Richards, and Ella E. Hutchings, wife of W. H. Hutchings, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledge to me that they executed the same.

IN WITNESS WHEREOF, I Have hereunto set my hand and affixed my Notarial Seal in the day and year in this certificate first above written.

(SEAL)

G. B. Thomas

Notary Public, Boise, Idaho

STATE OF IDAHO)
COUNTY OF GEM)ss:

I hereby certify that this instrument was filed for record at the request of Karl Paine at 35 minutes past 2 o'clock P. M., this 3rd day of Jan., 1924.

Cora J. Platt,
Deputy

Geo. F. Church
Ex-Officio Recorder

Fees, \$1.60

STATE OF IDAHO)
COUNTY OF GEM)ss:

I, Lillian M. Campbell, Ex-Officio Recorder in and for Gem County, Idaho, do hereby certify that the foregoing is a full, true and correct copy of the Deed executed by W. H. Hutchings et al to Alexander Lewis as the same appears on page 599 of Book 15 of Deed Records of Gem County, Idaho.

IN WITNESS WHEREOF, I have hereunto set my

hand and affixed my official seal this 12th day of April, 1938.

(SEAL)

Lillian M. Campbell
Ex-Officio Recorder
Gem County, Idaho.

PLAINTIFF'S EXHIBIT NO. 1 ADMITTED
AMERICAN SMELTING & REFINING
COMPANY

M. P.-N. Y.

Murray, Utah, Oct. 26, 1932.

Pay to the order of Alexander Lewis, NO. 40714

c/o Manufacturers Trust Co.,

Address 55 Broad St., New York City, N. Y. \$343.26

THE SUM OF \$343.26 CTS

To American Smelting & Refining Company,
NEW YORK CITY, N. Y.

Endorsed on Front:

Paid

G. W. MORRISON

Dec. 28, 1932

A. J. BOSWORTH

WARNING: The NATIONAL SURETY
COMPANY WILL PROSECUTE to a Con-
viction anyone who tampers with this check.

Endorsed on Back

Pay to the order of

Manufacturers Trust Company

Alexander Lewis

(Two Bank Endorsements)

PLAINTIFF'S EXHIBIT NO. 2 ADMITTED
AMERICAN SMELTING & REFINING
COMPANY

M. P.-N. Y.

Murray, Utah, Jan. 5, 1933

Pay to the order of Mr. Alexander Lewis. NO. 40803
c/o Manufacturers Trust Co.,

Address 55 Broad St., New York City, N. Y. \$738.13

THE SUM OF \$738 and 13 CTS

To American Smelting & Refining Company,
NEW YORK CITY, N. Y.

G. W. MORRISON

A. J. Bosworth

Endorsed on Front: PAID FEB. 8, 1938

Warning: The National Surety Company will prosecute to a conviction anyone who tampers with this check.



Endorsed on Back

Pay to the order of
Manufacturers Trust Company
Alexander Lewis

MANUFACTURERS TRUST COMPANY
SECURITIES DEPARTMENT
55 BROAD ST.
NEW YORK CITY

PLAINTIFF'S EXHIBIT NO. 3 ADMITTED

AMERICAN SMELTING & REFINING
COMPANY

M. P.-N. Y.

Murray, Utah, Dec. 14, 1932.

Pay to the order of Alexander Lewis NO. 40769

c/o Manufacturers Trust Co.,

Address 55 Broad St., New York City, N. Y. \$400.70

THE SUM OF \$400.70 CTS

To American Smelting & Refinig Company,
NEW YORK CITY, N. Y.

G. W. MORRISON

A. J. Bosworth

ENDORSED ON FRONT: Paid Dec. 28, 1932.

Warning: The National Surety Company will prosecute to a conviction anyone who tampers with this check.



ENDORSED ON BACK

Pay to the order of

Manufacturers Trust Company

Alexander Lewis

(Two Bank Endorsements)



PLAINTIFF'S EXHIBIT NO. 4 ADMITTED

AMERICAN SMELTING & REFINING
COMPANY

G. P. N. Y.

Salt Lake City, Utah, April 7, 1933

Pay to the order of Alexander Lewis, NO. 11435
c/o Manufacturers Trust Co.,

Address 55 Broad St., New York City, N. Y. \$327.47
THE SUM OF \$327.and 47 CTS.

To American Smelting & Refining Company
NEW YORK CITY, N. Y.

G. W. MORRISON
A. J. Bosworth

ENDORSEMENT ON FRONT: Paid Apr. 11, 1933.

Warning: The National Surety Company will prosecute to a conviction anyone who tampers with this check.



ENDORSED ON BACK

Pay to the order of
Manufacturers Trust Company
Alexander Lewis

(One Bank Endorsement)

(Title of Court and Cause)

SUPPLEMENTAL MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT

Filed April 16, 1938

COMES NOW, the defendant, Manufacturers Trust Company, a corporation, by its attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of quashing the purported service and the jurisdiction of the court under said attempted service, and not generally, or for any other purpose whatsoever, and by permission of the court, does respectfully show the court:

I.

That Manufacturers Trust Company is a corporation created, organized, and existing under and by virtue of the laws of the State of New York, and is a resident and citizen of the State of New York; that the said corporation is not now, or at any other time has it been doing business in the State of Idaho.

II.

That heretofore and on the 23rd of March, 1938, this defendant, did, by similar motion, move to quash service of summons and complaint purported to have been made on the 2nd day of March, 1938, on this defendant, which service the defendant is informed and believes is the service upon which the plaintiff relies in this action. It appears also from the records in this case that purported service was attempted on the 5th day of

February, 1938, which service was not completed and was abandoned by the plaintiff. That relying upon said abandonment and the reissue of another summons and its purported service on the 2nd day of March, 1938, this defendant did not at the time of moving to quash said service include the purported service of February 5, 1938.

III.

That service of summons and complaint in this case has never been made upon the defendant, Manufacturers Trust Company, by personal service or otherwise, but that on or about the 5th day of February, 1938, the plaintiff caused a copy of the said summons and complaint in this case to be served upon Lillian Maude Campbell, Auditor and Recorder of Gem County, State of Idaho, at her office in the Court House in Emmett, Idaho. That the said Auditor and Recorder above named was not on the 5th day of February, 1938, or at any other time, and is not now the agent or business agent transacting business for said Manufacturers Trust Company, a corporation, in the State of Idaho, or elsewhere.

That said defendant, Manufacturers Trust Company, was not on the said 5th day of February, 1938, or at any other time, and is not now doing business in the State of Idaho, and that the purported service of summons and complaint in this case upon the said Lillian Maude Campbell, as Auditor and Recorder of Gem

County, State of Idaho, did not constitute service there-
of upon the said defendant corporation; that it is not
and has not been served with summons and complaint
in this action as provided by law.

IV.

That after the said purported service and on the 7th
day of February, 1938, the plaintiff caused another
summons to be issued in the above entitled court and
cause and the same was returned without service for
the reason stated by the United States Marshal of Idaho
that the defendant could not be found. That thereafter
the plaintiff made and filed in the above entitled court
and cause on the 8th day of February, 1938, an affi-
davit to perfect service and prayed for an order for ser-
vice of summons on the Recorder of Gem County,
Idaho.

That thereafter and on the 8th day of February,
1938, the Judge of the above entitled court ordered the
service of summons which as aforesaid was returned
unserved upon the defendant.

That thereafter another summons was issued which
was purported served upon the defendant on the 2nd
day of March, 1938; that the plaintiff abandoned and
did not rely upon the purported service made on the 5th
day of February, 1938.

V.

That this Honorable Court, therefore, does not have

jurisdiction of the defendant corporation, Manufacturers Trust Company.

VI.

That heretofore this court has adjudicated that the defendant was not doing business within the State of Idaho so as to subject it to the service of process in this cause. That said adjudication was made by order of this court on the day of....., 19.....

VII.

That the affidavits filed in connection with the motion to quash the said purported service of March 2nd, 1938, are hereby referred to and made a part of the showing to be considered in connection with this motion.

WHEREFORE, Hawley & Worthwine respectfully move that the purported service of summons and complaint on the defendant, Manufacturers Trust Company, a corporation, be quashed.

This motion is based upon the records and files in this action, including this motion.

Dated this 14th day of April, 1938.

JESS HAWLEY
HAWLEY & WORTHWINE
Residence: Boise, Idaho
Attorneys for Defendant,
Manufacturers Trust Company,
a corporation,
appearing specially.
S. T. SCHREIBER

(Title of Court and Cause)

AFFIDAVIT

Filed April 1, 1938

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss:

Lester R. Bessell, being duly sworn, deposes and says:

I am a Vice-President and Assistant Treasurer of Huron Holding Corporation, a New York corporation, and have personal knowledge of the facts hereinafter stated,

I have read the annexed affidavit of James L. Fozard and am fully familiar with the facts therein stated referring to said Huron Holding Corporation, and that said facts set forth in said affidavit are in all respects true to my own knowledge.

That said Huron Holding Corporation, on or about February 9, 1932, became the owner of the equitable interest in Lincoln Mine, Gem County, Idaho, record title to which was held by Alexander Lewis, now deceased. That said Huron Holding Corporation became such equitable owner by virtue of a written assignment made by Manufacturers Trust Company to it on or about February 9, 1932, whereby said Trust Company assigned and transferred to it two notes of Industrial Bond & Finance Corporation in the respective sums of \$21,051.31

and \$124,435.25, in connection with which obligations said Lincoln Mine has been conveyed, as set forth in Mr. Fozard's affidavit.

That said Huron Holding Corporation is a New York stock corporation and never was and is not now a holding company, or a subsidiary of, or affiliated with, defendant, Manufacturers Trust Company. Said Huron Holding Corporation was organized about the time that the Chatham Phenix National Bank and Trust Company was merged into defendant, Manufacturers Trust Company, on or about February 9, 1932. The stock of said Huron Holding Corporation was issued independently of the stock of said merged Trust Companies, and has been traded in continuously since then. The stock of said Huron Holding Corporation was issued to the stockholders of the said Chatham Phenix National Bank and Trust Company and Manufacturers Trust Company share for share, in exchange for non-liquid assets of said Trust Companies, which assets were purchased by said Huron Holding Corporation and paid for by its income paying debentures. That after the stock was so issued, considerable trading was had therein and much of the said stock has changed ownership and title and is not held by the same shareholders to whom it was originally issued.

That all moneys expended on the Lincoln Mine in connection with the care thereof and of the personal property thereon or anything done for the preservation thereof

has been at the sole expense of and paid by the Huron Holding Corporation and not by the defendant, Manufacturers Trust Company.

That at all times since the 9th of February, 1932, the Huron Holding Corporation has claimed to be the owner of all beneficial interests in the Lincoln Mine and the Property connected therewith which was formerly in the ownership of the defendant, Manufacturers Trust Company and that corporation has repeatedly admitted that it has no longer any beneficial interest, right or title in or to the said property, and that the same is owned by the Huron Holding Corporation.

Lester R. Bessell

Subscribed and sworn to before me this 28 day of March, 1938.

W. L. Boesch

(SEAL)

William L. Boesch,
Notary Public, Westchester
County.

Commission Expires March
30, 1939.

Received Copy
March 30/38
S. T. Schreiber

(Title of Court and Cause)

AFFIDAVIT OF JAMES L. FOZARD IN CONNEC-
TION WITH DEFENDANT'S MOTION TO
QUASH SERVICE OF SUMMONS
AND COMPLAINT

Filed April 1, 1938

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss:

JAMES L. FOZARD, being duly sworn, deposes and says:

I am a Vice-President of the Manufacturers Trust Company, a New York banking corporation and one of the defendants herein, and make this affidavit in support of the application of said defendant to quash the alleged service of the summons and complaint upon it within the State of Idaho.

That said defendant, Manufacturers Trust Company, has never done any business either directly or indirectly within the State of Idaho. That its only asset or holding within said state was its beneficial interest prior to February 9, 1932, in the mine known as the Lincoln Mine in Gem County, Idaho. That it never had any other property or interest in property within the State of Idaho.

The following is a brief history of the interest of the defendant, Manufacturers Trust Company in said mine.

On or about July 30, 1923, the Columbia Bank, a New York State banking corporation, doing business in the City of New York, loaned to Industrial Bond & Finance

Corporation, the sum of \$125,000. to provide funds with which said borrower was to pay for the said Lincoln Mine. \$100,000. of said loan was used for the purchase price of said mine and the balance of \$25,000. was credited to the borrower's account. The loan was evidenced by the collateral note of the borrower. The deed to said Lincoln Mine was received by said bank in connection with said loan. Shortly thereafter said Columbia Bank was merged into defendant, Manufacturers Trust Company, and under the laws of the State of New York covering such a merger the Manufacturers Trust Company became the owner of the equitable interest in said mine. The legal title thereto was held by the defendant, Alexander Lewis, an employee and nominee of said Manufacturers Trust Company, and was properly recorded.

Said defendant Lewis held the legal title to the mine for the benefit of the defendant, Manufacturers Trust Company, until on or about February 9, 1932, when Manufacturers Trust Company assigned all its interest therein to Huron Holding Corporation, a New York corporation. Thenceforth said defendant Lewis, the legal title holder of said property, continued as the legal owner of record for the benefit of Huron Holding corporation instead of Manufacturers Trust Company until his death in December, 1937. The latter parted with all its interest in said mine property by assigning to said Huron Holding Corporation two notes of Industrial Bond & Finance Corporation in the respective sums of \$124,435.25 and \$21,051.31, which evidenced the obligation originally in-

curred to said Columbia Bank. Said notes were assigned by defendant, Manufacturers Trust Company, together with many other notes and securities aggregating many millions of dollars to said Huron Holding Corporation, by a written assignment dated February 9, 1932, and delivered on or about said date.

That under the terms of said assignment the said Manufacturers Trust Company agreed to make all necessary conveyances and assurances of title to effectuate the assignment of the notes and the securities connected therewith. That it was the intention of said Manufacturers Trust Company to assign the said Lincoln Mine and all the properties connected therewith in which it had any interest whatsoever in the State of Idaho. That from that date on it has repeatedly admitted that it no longer held any beneficial interest, right or title in the said Lincoln Mine or any property connected therewith in the State of Idaho, and that the said Huron Holding Corporation, the assignee under said written assignment, was the owner of all the interests in said property, and has at all times been able, ready and willing to make such further assurances of title and conveyance thereof to the said Huron Holding Corporation. That it has not since the date of the said written assignment had or claimed any interest whatsoever in and to the said Lincoln Mine and the property connected therewith.

Said Huron Holding Corporation was not and is not now a holding corporation or a subsidiary of, or affiliated with, defendant, Manufacturers Trust Company, but an

independent corporation as shown by the annexed affidavit of Lester R. Bessell, one of its officers.

On or about March 26, 1926, said defendant, Manufacturers Trust Company, through the defendant, Alexander Lewis, the record and legal title holder of said mine, leased the same to one H. W. Dorman, with an option of purchase, but said lease was breached by the tenant in possession and on or about August 22, 1931, Lincoln Mine Operating Company, which was the successor of the said Dorman, surrendered the premises and executed and delivered to the defendant, Alexander Lewis, a quitclaim deed to said property. That at all times the said plaintiff herein was and still is the President of the said Lincoln Mine Operating Company and the holder of the majority of the issued capital stock thereof; and in active charge of the management of said corporation.

Thereafter, and on or about November 21, 1931, a lease was made by the defendant Lewis to the Plaintiff for ten years, which lease was thereafter breached by the tenant in possession and the premises surrendered to the owner on or about April 25, 1933.

After February 9, 1932, defendant, Manufacturers Trust Company, has had no interest in said mine. Its only contact with the Huron Holding Corporation with reference to said mine was a management agreement entered into between it and said Huron Holding Corporation in order to lend to the latter the facilities of said Manufacturers Trust Company in the liquidation of the

various accounts transferred and assigned as aforesaid, but at no time during the performance of that agreement, or at any other time, did defendant, Manufacturers Trust Company, work said mine or do any other business in the State of Idaho.

That the expenditures made in the preservation and care of the said Lincoln Mine since February 9, 1932, has been at the sole expense and cost of the Huron Holding Corporation, and the defendant, Manufacturers Trust Company, has not made any expenditures, or incurred any indebtedness on its own account in connection either with the preservation or the care or otherwise in connection with said Lincoln Mine in the State of Idaho.

That the foregoing facts are within my personal knowledge and the annexed affidavit is offered in corroboration and support thereof.

James L. Fozard

Subscribed and sworn to before me this 28 day of March, 1938.

W. L. Boesch
Notary Public.

(SEAL)

Received Copy
Mar. 30/38
S. T. Schreiber

(Title of Court and Cause)

MINUTES OF THE COURT OF APRIL 16, 1938.

The motions pending herein were reset for ten o'clock A. M. on April 22nd, 1938.

(Title of Court and Cause)

MINUTES OF THE COURT OF APRIL 22, 1938.

The motion of Manufacturers Trust Company to quash service of summons was argued before the Court by counsel for the respective parties.

Wm. I. Phillips was sworn and examined as a witness and documentary evidence was introduced.

The Plaintiff's motion for the entry of default was also argued. At the conclusion of the argument, the Court took the motion to quash under advisement, and denied the motion for entry of default.

(Title of Court and Cause)

OPINION

Filed May 5, 1938.

S. T. Schreiber, Boise, Idaho,

Attorney for the Plaintiff.

Hawley & Worthwine, Boise, Idaho,

Attorneys for the Defendants.

May 5, 1938.

CAVANAUGH, District Judge.

The sole question remaining for decision on the motion to quash service of summons and complaint, as the other questions presented at the same time were disposed of from the bench, is, was the defendant Manufacturers Trust Company, organized under the laws of the State of New York, doing business in the State of Idaho, when the attempted service was made on February 5, 1938, upon the Auditor of Gem County, Idaho? If not, then the Court would not obtain jurisdiction of the foreign corporation.

The nature of the action is one where it is alleged that the contract and conspiracy were made outside of the State of Idaho and in New York. The cause of action arose in New York and the attempted service here is not sufficient to give this Court jurisdiction of such cause of action. *Simon v. Southern Railway Company*, 236 U. S. 115.

That statute under which service was attempted to be made is one relating to service upon a foreign corporation and it requires that at the time the service is made such corporation must then be doing business within the state, Section 5-507.

What then is the showing upon the special motion to quash service?

It appears that the defendant Manufacturers Trust

Company, on February 9, 1932, transferred all of its interest in the property then owned by it to the Huron Holding Corporation and has not since then been doing business within the State of Idaho.

The showing presented by the plaintiff falls far short of establishing that the defendant Manufacturers Trust Company owned property or was doing business in the State of Idaho at the time the attempted service of summons and complaint was made. Of course, service of process against a foreign corporation is not effective when service upon a state officer is made if the corporation is not at the time doing business in the state. *Old Wayne Mutual Life Association of Indianapolis v. McDonough*, 204 U. S. 8; *Simon v. Southern Railway Company*, *supra*.

Of course, it is elementary that jurisdiction of persons of the defendants is acquired by the service of process and not upon the return. *Blandy v. Modern Box Manufacturing Company*, 40 Idaho 356.

Although the motion for default of the defendant was overruled from the bench at the conclusion of the hearing and the views of the Court then given, it will be repeated here that the first special motion to quash the service of summons in the body of it expressly states that the defendant Manufacturers Trust Company moves to quash the service of the summons and complaint although the prayer states to quash the summons and complaint. It is the substance and representations and contentions of the

parties then presented on the motion that governs when in determining what was the motion. Admittedly at the time the first motion to quash, it was presented to the Court as a motion to quash the service.

The conclusion reached from the facts is that the Manufacturers Trust Company was not doing business in the State of Idaho at the time the attempted service of summons was made on February 5, 1938, for it had prior thereto disposed of and transferred all its interest in the state to the Huron Holding corporation in February 1932, who took it over. It seems that the legal and record title of the Lincoln Property has for some time stood in the name of the defendant Lewis, however that may be, it stands uncontradicted from the showing here made that the defendant Manufacturers Trust Company prior to the time attempted service of summons was made upon the Auditor of Gem County, Idaho, it had transferred in February 1932 all of its interest in this State to the Huron Holding Corporation and had ceased doing business in this State.

It follows then that the motion of the defendant Manufacturers Trust Company to quash service of summons is sustained.

(Title of Court and Cause)

ORDER.

Filed May 5, 1938.

In harmony with memorandum opinion filed this date, the motion of the plaintiff to enter the default of the defendant Manufacturers Trust Company a corporation, and the motion of the defendant Manufacturers Trust Company, a corporation to quash service of summons and complaint having been presented and after consideration of the same it is ORDERED:

1. That the motion of the plaintiff for default is denied.
2. That the motion of the defendant Manufacturers Trust Company, a corporation, to quash the service of summons and complaint on it is granted.

Exception allowed.

Dated May 5, 1938.

CHARLES C. CAVANAUGH,
District Judge.

(Title of Court and Cause)

EXCEPTIONS TO RULINGS.

Lodged May 10, 1938.

BE IT REMEMBERED, That on this 22nd day of April, 1938, came on to be heard the plaintiff's motion for default, and the motion of defendant's "to quash the service of summons and complaint" in the above entitled ac-

tion, No. 1971, and the Court hearing argument first, on the motion of the defendant's to quash and second the argument on plaintiff's motion for default, by reason of defendants failure of filing an affidavit of defense, and a failure of compliance by defendant with rule 25 of this court, and the court from the bench having over-ruled the motion of the Plaintiff's for a default, and stating that the sole question before the Court, "was the defendant, MANUFACTURERS TRUST COMPANY, doing business in the State of Idaho at the time, February 5, 1938," to which rulings of the court in all things plaintiff then and there excepted, and hereby tenders his bill of exceptions, requesting the same be made a part of the record because none of the said matters otherwise appear, and plaintiff prays that his exceptions be signed, and allowed, and approved, and made a part of the record pursuant to rules, and practice in such case made and provided; and is accordingly done.

Dated this.....day of May, 1938.

.....
 Judge of the Entitled Court.

 (Title of Court and Cause)

BILL OF EXCEPTIONS.

Filed May 12, 1938.

Be it remembered that on the 22nd day of April 1938,

came on to be heard the plaintiff's motion for default, and defendant's motion to quash the service of summons and complaint in the above entitled action, and the Court after hearing argument of respective counsel and considering the same entered an Order sustaining the motion to quash service of summons and complaint and overruling motion of the plaintiff for default, to which ruling of the Court in all things plaintiff then and there excepted and hereby tenders his bill of exceptions, requesting the same to be made a part of the record and the plaintiff prays that his exceptions be signed, allowed and approved, and made a part of the record pursuant to rules and practice in such case made and provided and is accordingly done.

Dated May 12, 1938.

CHARLES C. CAVANAH,
United States District Judge.

(Title of Court and Cause)

MOTION TO REMAND TO STATE COURT.

Filed June 11, 1938.

TO THE HONORABLE C. C. CAVANAH, JUDGE
OF THE ABOVE ENTITLED COURT:

Now comes the plaintiff by his Attorney of record in the above entitled cause, and moves the Court to remand said cause to the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, from

which it was removed, for trial, upon the following grounds. That this Court has ruled that the defendant, Manufacturers Trust Company, a foreign corporation, was not doing business in the State of Idaho at the time to-wit: February 5, 1938, when the attempted service was made from this Court, and that the said defendant was not within its jurisdiction.

Said Motion is based upon the record, and for reasons apparent therein, and the law in the particular case.

S. T. Schreiber,
Attorney for Plaintiff,
Residence, Boise, Idaho.

(Title of Court and Cause)

MINUTES OF THE COURT OF JUNE 13, 1938.

The case came on for hearing on the plaintiff's motion to remand the case to the State Court, which motion was resisted by the defendants. Said motion was argued before the Court by counsel for the respective parties.

Whereupon, the Court announced his conclusions, and ordered the motion to remand be, and the same hereby is denied.

(Title of Court and Cause)

ORDER.

Filed June 13, 1938.

In harmony with memorandum opinion filed in this case on May 5, 1938, and the record, files and proof heretofore presented where it appears that the motions to quash service of summons upon the defendant Manufacturers Trust Company were sustained and the motion of the plaintiff to again remand the cause to the State Court, filed on the 11th day of June, 1938, having been presented by counsel for the respective parties in Court on this day and after a consideration and determination of the motions to quash service of summons and the motion to again remand the cause to the State Court, and it appearing therefrom that service of summons cannot be made upon the defendant Manufacturers Trust Company within the State of Idaho, issued either out of this Court or the State Court, for the reasons appearing in said memorandum filed May 5, 1938, and the record, and under the laws of the State of Idaho, this Court is without Federal jurisdiction to proceed further with the case and should dismiss the same.

Now, Therefore, It is ORDERED that said cause be dismissed with defendant Manufacturers Trust Company's Costs

Dated this 13th day of June, 1938.

Charles C. Cavanah,
District Judge.

(Title of Court and Cause)

BILL OF EXCEPTIONS.

Filed June 21, 1938.

Be it remembered that on the 13th day of June, 1938, came on to be heard, the plaintiff's motion heretofore filed on the 11th day of June, 1938, to remand the said cause to the District Court of the Third District of the State of Idaho, in and for Ada County, from which it was removed, and for the reasons specified in the motion, the Court hearing argument of the plaintiff, and also allowed defendant's attorney to present argument in opposition thereto, to which plaintiff objected, and after re-consideration and determination of defendants former motion to quash service of summons against the Manufacturers Trust Company, a corporation, the Court again refused to remand the cause for the reason appearing in the memorandum opinion filed as of May 5, 1938; and upon the affidavits filed, the entire records and files in the cause and under the laws of the State of Idaho; that the Court is without Federal Jurisdiction to proceed further and should dismiss the same, and did order and did dismiss the complaint against said Manufacturers Trust Company, a corporation, with costs, to which rulings of the Court in all things, Plaintiff excepted and hereby tenders his Bill of Exceptions requesting it be made a part of the record; and plaintiff prays that his exception be signed,

allowed, and approved, and made a part of the record, pursuant to rules and practice in such case, made and provided.

Dated this 21st day of June, 1938.

Charles C. Cavanah, .
United States District Judge.

(Title of Court and Cause)

ORDER.

Filed August 11, 1938.

The proposed bill of exceptions filed on August 5, 1938 and the amendments and objections thereto filed on August 10, 1938 were on August 10, 1938, presented to me for settlement, and after considering the same I find that the proposed bill of exceptions contains matters of pleadings and records of the Clerk's office which are properly part of Clerk's record and not a part of the Bill of Exceptions to now be settled by the Judge of this Court, and does not comply with or contain the matters required to be contained and incorporated in a general Bill of Exceptions to now be settled as required by rule 76 of this Court, which is:

“A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at any time the ruling is made, or at any subsequent time during the trial,, if the ruling was made during a

trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the Clerk.

If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial within ten days after the rendition of the verdict, or, if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions. The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tended to prejudice the rights of such party. Within ten days after such service the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendments shall within five days thereafter be delivered by the proposing party to the Clerk for the Judge. The Clerk must, as soon as practicable thereafter, deliver said proposed bill and amendments to the Judge, who must thereupon designate a time at which he will settle the bill; and the Clerk must as soon as practicable, thereafter notify or inform both parties of the time

so designated by the Judge. In settling the bill the Judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it, and must strike out of it all irrelevant, unnecessary, redundant and scandalous matter. After the bill is settled, it must be engrossed by the party who proposed the bill, and the Judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the Clerk."

And therefore the same should not now be settled by the Judge of the Court and settlement of the same is denied.

Dated August 11, 1938.

Exception allowed.

Charles C. Cavanah,
District Judge.

(Title of Court and Cause)

PETITION FOR APPEAL.

Filed August 23, 1938.

TO THE HONORABLE CHARLES C. CAVANAH,
JUDGE OF THE DISTRICT COURT FOR THE
DISTRICT OF IDAHO, SOUTHERN DIVI-
SION:

Comes now the petitioner, William I. Phillips, who is

plaintiff in the above entitled cause and respectfully shows, that on or about June 13, 1938, judgment of dismissal was entered in this court in this cause against the plaintiff and in favor of the defendants, Manufacturers Trust Company, a corporation, and Alexander Lewis, dismissing the complaint in which judgment, orders, and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this petitioner all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said action is an action at law for the recovery of damages for fraud by defendants committed against plaintiff.

And your petitioner feeling and considering himself aggrieved by the orders and judgment of dismissal made and entered on said date in the above cause, does hereby appeal from the whole thereof to the United States Circuit Court of Appeals of the Ninth Circuit under the laws of the United States, made and provided, and for the reasons specified in the assignment herewith filed.

WHEREFORE, your petitioner desires that said appeal shall be allowed, and therefore PRAYS that an Order be made fixing the amount of security and costs, which said William I. Phillips shall give and furnish upon such appeal, that citation may issue as provided by law, that a transcript of the records, proceedings and papers in said cause duly authenticated, may be sent to said Circuit Court of Appeals, and that upon giving such se-

curity further proceedings in this Court be suspended and stayed until the determination of said Appeal by the Ninth Circuit Court.

Dated August 23rd, 1938.

S. T. SCHREIBER,
Attorney for Petitioner,
William I. Phillips,
Residence, Boise, Idaho.

Received a copy and accept service of the foregoing petition for appeal, this 23d day of August, 1938.

HAWLEY & WORTHWINE,
Attorneys for Defendants,
Residence, Boise, Idaho.

The ABOVE AND FOREGOING PETITION together with ASSIGNMENT OF ERRORS, and PRAYER for reversal having been this day filed, and to me presented:

IT IS HEREBY ORDER, THAT THE SAID PETITION AND APPEAL, AS THEREIN PRAYED, BE AND THE SAME IS, HEREBY GRANTED AND ALLOWED:

It is further ORDERED that petitioner give bond in the sum of FIVE HUNDRED (\$500.00) DOLLARS with sufficient surety to be approved by the undersigned and conditioned to prosecute said appeal to effect, and if

it fail, to make his plea to answer all costs as by law required.

Dated at Boise, Idaho, this 23d day of August, 1938.

CHARLES C. CAVANAHA,
Judge of the Above Entitled Court.

(Title of Court and Cause)

ASSIGNMENT OF ERRORS.

Filed August 23, 1938.

COMES NOW, William I. Phillips, plaintiff and appellant in the above entitled action by his attorney of record, and makes and files, with his petition for appeal in this action, assignment of the following errors, which he asserts occurred on the trial thereof, and intends to urge on said appeal, and upon which he relies to reverse the Judgment entered herein as appears of record:

(1.) That the Court erred in assuming jurisdiction of the cause in the first instance, on removal from the State Court to the Federal Court, and in denying the motion to remand.

(2.) The Court erred in his judgment of October 5th, 1937, in setting aside the default of defendant, Manufacturers Trust Company, and in quashing the service of summons and complaint in the action.

(3.) The Court further erred in denying the motion

of plaintiff filed on the 11th day of June, 1938, to remand said action to the State Court of the Third Judicial District of the State of Idaho, in and for Ada County from which it was removed for trial.

(4.) And the court erred in dismissing the action on June 13, 1938, after the Statutes of Limitation, preventing the filing of a new action, had run thereby depriving plaintiff of enforcing his demands against defendants.

(5.) And erred in rendering Judgment for cost to defendants.

WHEREFORE, Plaintiff, appellant prays that the judgment entered in said action in the above entitled court on the 13th day of June, A. D., 1938, be reversed, and that the said United States District Court be ordered and directed to remand the same for trial to the State Court.

S. T. Schreiber,
Attorney for Plaintiff and
Appellant,
Residing at Boise, Idaho.

Service of the above and foregoing Assignment of Errors, by receipt of copy thereof, this 23rd day of August, A. D., 1938, is hereby acknowledged.

Hawley & Worthwine,
Attorneys for Defendants
and Appellees.

(Title of Court and Cause)

BOND ON APPEAL.

Filed August 23, 1938.

KNOW ALL MEN BY THESE PRESENTS: That we, William I. Phillips as principal, and J. H. Hopffgarten and W. H. Biggs, as sureties, acknowledge ourselves to be jointly indebted to the Manufacturers Trust Company, a corporation, and Alexander Lewis, appellees in the above entitled cause in the sum of FIVE HUNDRED (\$500.00) DOLLARS, (as indicated by the Judge allowing the appeal), conditioned that;

Whereas on the 13th day of June, A. D. 1938, in the District Court of the United States for the District of Idaho, in a suit depending in that court, wherein William I. Phillips was plaintiff, and Manufacturers Trust Company and Alexander Lewis, defendants, numbered on the docket as #1971, a judgment of dismissal was rendered against the said William I. Phillips, and the said William I. Phillips having obtained or is about to obtain an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said judgment, and a citation directed to the said Manufacturers Trust Company and Alexander Lewis, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the.....day of October, A. D. 1938, next.

NOW, IF THE SAID WILLIAM I. PHILLIPS

shall prosecute his appeal to effect and answer all damages for costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

William I. Phillips,
Principal.
J. H. Hopffgarten,
Surety.
W. H. Biggs,
Surety.

COUNTY OF ADA,)
STATE OF IDAHO) ss.

J. H. Hopffgarten and W. H. Biggs, whose names are subscribed as the sureties to the above undertaking being severally duly sworn, each for himself and says: That he is a resident and free holder within the said County of Ada, and State of Idaho; that he is worth the sum in the said undertaking specified as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

J. H. Hopffgarten,
Surety.
W. H. Biggs,
Surety.

Subscribed and sworn to before me, a Notary Public for the State of Idaho, this 18th day of July, 1938.

Elmer W. Fox,
Notary Public for Idaho,
Residing at Boise, Idaho.

(SEAL)

Approved this 23rd day of August, 1938.

Charles C. Cavanah,

Judge.

(Title of Court and Cause)

CITATION.

Filed August 23, 1938.

TO THE UNITED STATES OF AMERICA, (ss. THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE MANUFACTURERS TRUST COMPANY, A CORPORATION, AND ALEXANDER LEWIS, DEFENDANTS, ABOVE NAMED, AND JESS HAWLEY AND OSCAR W. WORTHWINE, THEIR ATTORNEYS, GREETINGS:

You and each of you are hereby cited and admonished to be present in the City of San Francisco, State of California, within thirty days from the date of this WRIT, pursuant to appeal duly allowed and filed in the Clerk's Office of the District Court of the United States for the District of Idaho, Southern Division, wherein William I. Phillips is appellant and you are appellees to show cause, if any there be why the judgment and order against said appellant, in said appeal mentioned, should not be corrected and speedy justice be done to the party in that behalf.

WITNESSETH: The Honorable Charles C. Cavanah, Judge of the District Court of the United States, in

and for the District of Idaho, Southern Division, this 23rd day of August A. D., 1938, and of the Independence of the United States, the One Hundred and Sixty-second year.

Charles C. Cavanah,
Judge of the United States Dis-
trict Court for the District of
Idaho, Southern Division.

Attest:

W. D. McReynolds, (SEAL)
Clerk.

Service of the above and foregoing citation by receipt of copy thereof, this 23rd day of Aug. A. D., 1938, is hereby admitted.

Hawley & Worthwine,
Residing at Boise, Idaho,
Attorneys for Defendants.

(Title of Court and Cause)

PRAECIPE.

Filed August 23, 1938.

TO THE CLERK OF THE ABOVE ENTITLED
COURT:

You will please prepare, print, authenticate, transmit and return to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, in

accordance with the Act of Congress, approved February 13, 1911, (28 U. S. C. 865-866), together with the amendments and the rules of the Court adopted thereunder, transcript of the record in the above entitled action on the appeal of William I. Phillips, Plaintiff, vs. Manufacturers Trust Company, a corporation, and Alexander Lewis, defendants, to said Court from the judgment and order of dismissal made and entered in said action by the above entitled court on the 13th day of June, 1938, which said appeal was duly allowed and filed in your office on the 23rd day of August, 1938, and include in said transcript the following:

Complaint	February 8, 1937
Summons—Ada County	February 8, 1937
Return—Ada County	February 27, 1937
Summons—Gem County	February 8, 1937
Return—Gem County	February 11, 1937
Affidavit of Lillian M. Campbell	February 27, 1937
Affidavit of Lillian M. Campbell	February 27, 1937
Notice of Motion to Quash	February 27, 1937
Petition for Removal	February 27, 1937
Bond on Removal	February 27, 1937
Notice to Quash	February 27, 1937
Opposition of Motion to Quash, and Objections to Allowance of Removal	March 3, 1937
Affidavit of Ralph Shaffer	March 3, 1937
Affidavit of William I. Phillips	March 4, 1937
Authority of Attorney to Sign Bond	March 4, 1937

Order of Removal	March 4, 1937
Corrected Minutes	March 4, 1937

The above papers constitute the record on removal from the State Court to the Federal Court.

Certificate on Removal	March 18, 1937
Motion to Remand	March 30, 1937
Affidavit on Motion to Remand (Baxter)	March 30, 1937
Affidavit on Motion to Remand (Arnold)	March 30, 1937
Affidavit on Motion to Remand (J. W. Crow)	March 30, 1937
Affidavit of Service—Lillian M. Campbell	April 9, 1937
Letter to Lewis by Auditor Campbell	April 9, 1937
Affidavit on Motion to Remand (Joiner)	April 9, 1937
Minutes of Court	April 14, 1937
Exceptions to Rulings	April 22, 1937
General Power of Attorney	April 14, 1937
Minutes of Court (Joint power of Attorney)	April 15, 1937
Order of Motion to Remand—Denied	April 16, 1937
Notice of Renewal of Motion to Remand	April 27, 1937
Renewal of Motion to Remand to State Court	April 27, 1937
Affidavit on Motion to Set Aside Overruled Motion—Remand Cause	April 27, 1937

Minutes of the Court	May 4, 1937
Bill of Exceptions	May 10, 1937
Praecipe for Default	June 2, 1937
Default	June 2, 1937
Motion to make Default Judgment	
Final	July 6, 1937
Motion to set aside Default	August 6, 1937
(Manufacturers Trust Company)	
Return on Service of Writ	August 5, 1937
Motion to set aside Default	August 6, 1937
(Alexander Lewis)	
Return of Service of Writ	August 5, 1937
Minutes of Court	September 13, 1937
Minutes of Court	September 30, 1937
Order of Court	October 5, 1937
Opinion of Court	October 5, 1937
Minutes of Court	October 5, 1937
Exceptions	October 20, 1937
Notice of Motion to Reconsider	
Order Overruling Motion to	
Remand	October 21, 1937
Motion to Reconsider Order Over-	
ruling Motion to Remand	October 21, 1937
Affidavit in Support of Motion	
to Reconsider (Robert Clark)	January 3, 1938
Minutes of Court	January 5, 1938
Exceptions	January 7, 1938
Summons from Federal Court	
Issued	February 7, 1938

Return of Summons	February 7, 1938
Summons	February 8, 1938
Return of Summons	February 8, 1938
Affadivit for Order to Perfect Service (William I. Phillips)	February 8, 1938
Order for Clerk to Issue Summons	February 8, 1938
Summons	February 8, 1938
Return	March 14, 1938
Affidavit—Lillian M. Campbell (No Filing Mark)	
Motion to Quash Service of Summons and Complaint	March 23, 1938
Affidavit of Mailing	March 23, 1938
Notice of Motion to Determine Motion to Quash Service of Summons and Complaint	April 8, 1938
Motion for Default	April 8, 1938
Certificate of Death (Alexander Lewis) (No Filing Mark)	
Affidavit in Opposition of Motion to Quash Service of Summons and Complaint (Phillips)	April 15, 1938
Affidavit in Opposition of Motion to Quash Service of Summons and Complaint (Jones)	April 15, 1938
Instrument—Deed—Checks	April 15, 1938
Supplemental Motion to Quash Ser- vice of Summons and Complaint	April 16, 1938
Affidavit of Bessell	April 1, 1938
Affidavit of Fozard	April 1, 1938

Minutes of Court	April 16 and 22, 1938
Opinion of Court	May 5, 1938
Order of Court	May 5, 1938
Exceptions	May 12, 1938
Motion to Remand to State Court	June 11, 1938
Minutes of Court	June 13, 1938
Judgment and Order for Dismissal	June 13, 1938
Bill of Exceptions	June 21, 1938

Compiled Bill of Exceptions as proposed August 5, 1938.

Amendments and Objections to Compiled, proposed Bill of Exceptions, August 10, 1938.

Dis-allowance of Bill of Exceptions, August 11, 1938.

All orders extending time for settling and filing Bill of Exceptions.

All Court Minutes and Journal Entries.

Petition for Appeal

Assignment of Errors

Order Allowing Appeal

Bond on Appeal and Approval

Citation

Copy of this Precipe

Order for Transmission of Exhibits

Your Certificate and Return

Rules of the Court, Nos. 25, 76, 82, 94.

In the preparing of the above records, you will please

omit the title to all pleadings, except the complaint, insert in lieu thereof, "Title of Court and Cause", followed by the name of the pleadings of instruments, and also omit the verification of all pleadings, inserting in lieu thereof, the words "Duly Verified".

Dated this 23rd day of August, 1938.

S. T. SCHREIBER,
Residing at Boise, Idaho,
Attorneys for Appellant.

Service of the above and foregoing Praecipe, by receipt of copy thereof this 23rd day of Aug., 1938, is hereby acknowledged.

HAWLEY & WORTHWINE,
Residing at Boise, Idaho,
Attorneys for Defendants and
Appellees.

(Title of Court and Cause)

NOTICE OF FILING PRAECIPE.

Filed August 26, 1938.

TO MESSRS. HAWLEY & WORTHWINE, ATTORNEYS FOR DEFENDANTS:

PLEASE TAKE NOTICE, That on the 23rd day of August, 1938, the undersigned, filed with the Clerk of this Court a Praecipe for the record to be transmitted to

the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, on the appeal allowed in the above cause, a copy of which Praeceptum has been served upon you.

You are further notified that in the interest of saving cost and expense, the Clerk has been instructed to eliminate, by striking from said Praeceptum, the following two items, to-wit:

Compiled Bill of Exceptions, filed August 5, 1938.

Amendments and Objections filed, August 10, 1938.

S. T. SCHREIBER,
Attorney for Plaintiff,
Appellant.

Received copy and *except* service of the foregoing Notice thisday of August, 1938.

HAWLEY & WORTHWINE,
Attorneys for Defendants and
Appellees.

(Title of Court and Cause)

NOTICE.

Filed August 26, 1938

TO THE CLERK OF THE ABOVE ENTITLED
COURT:

In preparing the record according to the Praeceptum, heretofore filed in the above entitled case on August 23, 1938,

you are hereby instructed to omit therefrom, the following two items to-wit:

Compiled Bill of Exceptions, filed August 5, 1938.

Amendments to same and Objections to same, filed August 10, 1938.

Notice and copy of the foregoing as on this day served upon Attorneys for Defendants and Appellees.

Dated at Boise, Idaho, August 26, 1938.

S. T. SCHREIBER,
Attorney for Plaintiff,
Appellant.

Copy received Aug. 26-38.

HAWLEY & WORTHWINE.

RULES

Rule No. 25

EXTENSION OF TIME TO PLEAD—MOTION
TO QUASH SUMMONS, ETC.

The pendency of a motion directed to the summons, complaint or answer shall enlarge the time to answer or demur, as the case may be, until the decision upon such motion and such time thereafter as may at the time of such decision be allowed; PROVIDED, that such motion be accompanied with a certificate of an attorney of this Court that he believes the motion well founded in point of law, and that it is not interposed for delay.

Rule No. 76

BILL OF EXCEPTIONS

A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at any time the ruling is made, or at any subsequent time during the trial, if the ruling was made during a trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the Clerk.

If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial within ten days after the rendition of the verdict, or, if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions. The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tended to prejudice the rights of such party. Within ten days after such service the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendments shall within five days thereafter be delivered by the proposing party to the

Clerk for the Judge. The Clerk must, as soon as practicable thereafter, deliver said proposed bill and amendments to the Judge, who must thereupon designate a time at which he will settle the bill; and the Clerk must, as soon as practicable, thereafter notify or inform both parties of the time so designated by the Judge. In settling the bill the Judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it, and must strike out of it all irrelevant, unnecessary, redundant and scandalous matter. After the bill is settled, it must be engrossed by the party who proposed the bill, and the Judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the Clerk.

Rule No. 82

EXTENSION OF TIME

When an act to be done in any action at law or suit in equity which may at any time be pending in this Court, relates to the pleadings in the cause, or the undertakings or bonds to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the giving of notices of motion, or to new trials the time allowed by these rules may, unless otherwise specially provided, be extended by written stipulation, or by the Court or Judge by order made before the expiration of such time. It shall be the duty of every party, attorney, solicitor, or counsel, or other person ap-

plying to the Court or Judge for an extension of time under this rule, to disclose the existence of any and all extensions to do such act or take such proceedings which have previously been obtained from the adverse party or granted by the Court or Judge; and any extension obtained from the Court or Judge in contravention of this rule shall be absolutely null and void, and may be disregarded by the adverse party. Nothing herein contained shall interfere with the power of the Court or Judge to extend the time to do an act or take a proceeding in any cause until after some event shall have happened or some step in the cause shall have been taken by the adverse party.

Rule No. 94

OBJECTIONS TO THE JURISDICTION OF THE COURT

Objections to the jurisdiction of this Court, as a Federal Court over any action at law, or suit in equity which has been removed from a State Court to this Court, may be made on a motion to remand such action or suit to the State Court.

Objections to the jurisdiction of this Court, as a Federal Court, over any action at law or suit in equity whether commenced in this Court or removed from a State Court to this Court and not remanded, may be taken as follows: If the objection appear on the face of the complaint or bill, it may be taken either by motion to dismiss PROVIDED, that the Court may in its discretion on sus-

taining the motion to dismiss, allow the complaint or bill to be amended. If the objection do not appear on the fact of the complaint or bill, it may be taken by the answer. If not taken as above provided, and the facts in relation to the jurisdiction do not subsequently appear in the course of the proceedings, the Court may refuse to allow the party thereafter to take proceedings for the purpose of making such facts appear. But if such facts be subsequently developed in the course of the proceedings, the party may then move to dismiss the case, or if it was removed from a State Court, to remand it to such Court; or the Court may dismiss or remand it of its own motion; PROVIDED, that in whatever mode the objection may be taken, and whether it be taken by the Court of its own motion or by a party to the cause, the party affected shall be accorded a hearing on the question.

(Title of Court and Cause)

OBJECTIONS TO PRAECIPE

Filed August 29, 1938

TO THE CLERK OF THE ABOVE ENTITLED
COURT:

The defendant, Manufacturers Trust Company, objects to the preparation, printing, authenticating, transmitting and returning to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, Cali-

fornia, the following files included in the praecipe filed by the plaintiff herein :

Affidavit of Lillian M. Campbell, filed February 27, 1937.

Affidavit of Lillian M. Campbell, filed February 27, 1937.

Affidavit of Ralph Shaffer, filed March 3, 1937.

Affidavit of William I. Phillips, filed March 4, 1937.

Affidavit on Motion to Remand (Baxter), filed March 30, 1937.

Affidavit on Motion to Remand (Arnold), filed March 30, 1937.

Affidavit on Motion to Remand (J. W. Crow), filed March 30, 1937.

Affidavit of Service—Lillian M. Campbell, filed April 9, 1937.

Letter to Lewis by Auditor Campbell, filed April 9, 1937.

Affidavit on Motion to Remand (Joiner), filed April 9, 1937.

Affidavit on Motion to set aside Overruled Motion—Remand Cause, filed April 27, 1937.

Affidavit in support of Motion to Reconsider (Robert Clark), filed January 3, 1938.

Affidavit for Order to Perfect Service (William I. Phillips), filed February 8, 1938.

Affidavit—Lillian M. Campbell (No filing mark).

—Certificate of Death (Alexander Lewis) (No filing mark).

Affidavit in Opposition of Motion to Quash Service of Summons and Complaint (Jones), filed April 15, 1938.

Affidavit of Bissell.

Affidavit of Fozard.

on the following grounds :

(a) That each of the described papers are affidavits and are not properly a part of the record in this case on appeal.

(b) That said papers have not been included in any bill of exceptions.

(c) That the incorporation of said papers and each of them constitutes an unnecessary, expensive and unjustified addition to the record.

Defendant gives notice hereby that it will move to dismiss the appeal on the ground that the record is not a proper record for the reasons above stated.

Dated August 27, 1938.

JESS HAWLEY,
OSCAR W. WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Defendant,
Manufacturers Trust Company.

(Title of Court and Cause)

AFFIDAVIT OF MAILING

Filed August 30, 1938

STATE OF IDAHO,)
County of Ada.) ss.

LITHA WENTZ, being first duly sworn, deposes and says:

That she is a citizen of the United States over the age of twenty-one years, that she is a clerk and stenographer employed at Boise, Idaho, by Hawley & Worthwine, attorneys; that upon the 27th day of August, 1938, at the request of Jess Hawley, a member of said firm, she deposited in the United States Post Office at Boise, Idaho, postage prepaid, and caused to be registered, copy of Objections to Praecipe in the above entitled cause, to S. T. Schreiber, 1802 North 8th Street, Boise, Idaho. That said envelope containing said paper was securely sealed and had sufficient postage thereon to carry the same by registered mail to the above named person at his address.

LITHA WENTZ.

Subscribed and sworn to before me this 30th day of August, 1938.

(SEAL)

CHAS. W. MACK,
Notary Public for Idaho,
Residing at Boise, Idaho.

(Title of Court and Cause)

DEFENDANT'S PRAECIPE

Filed August 30, 1938

TO THE CLERK OF THE ABOVE ENTITLED
COURT:

You will please prepare, print, authenticate, transmit and return to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, in accordance with the Act of Congress approved February 13, 1911, (28 U. S. C. 865-866) together with the amendments and the rules of the court adopted thereunder, transcript of the record in the above entitled action on the appeal of William I. Phillips, Plaintiff, vs. Manufacturers Trust Company, a corporation, and Alexander Lewis, Defendants, to said court from the judgment and order of dismissal made and entered in said action by the above entitled court on the 13th day of June, 1938, which said appeal was duly allowed and filed in your office on the 23d day of August, 1938, and include in said transcript the following:

Objections to Praecipe, filed August 29, 1938.

Affidavit of Mailing, filed August 30, 1938.

Dated this 30th day of August, 1938.

HAWLEY & WORTHWINE

JESS HAWLEY

OSCAR W. WORTHWINE

Residence: Boise, Idaho,

Attorneys for Defendant,

Manufacturers Trust Company.

(Title of Court and Cause)

ORDER FOR TRANSMISSION OF EXHIBITS
Filed September 1, 1938

Upon application of counsel for the appellant herein,

IT IS ORDERED That all original exhibits admitted and filed in the above entitled case be transmitted, by the Clerk of this Court, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in connection with the appeal in said cause to that Court.

Dated at Boise, Idaho, this 1st day of September, 1938.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

CERTIFICATE OF CLERK

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to ~~164~~ 164 inclusive, to be full, true, and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe of the appellant and appellee filed herein.

I further certify that the cost of the record herein amounts to the sum of \$194.35 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 10th day of September, 1938.

W. D. McREYNOLDS, Clerk.

(SEAL)